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AN EDITORIAL

IMITATION has been called the sincerest form of flattery. From one point of view, therefore, it should be pleasing to the American Arbitration Association when parties to commercial contracts, wishing to express an intention of arbitrating in accordance with fair and impartial procedures, refer to AAA rules as their standard. But unless they also provide for AAA *administration,* their arbitration clause may prove futile—a circumstance that can be pleasing to no one.

A case in point was that of Sandowski v. Wetzler, recently decided by the New York Supreme Court and reported on page 107 of this issue of *The Arbitration Journal.* Apparently with the intention of providing for arbitration of future disputes in accordance with procedures which the Association has evolved in thirty-five years of experience, the parties provided that in case of future disputes, they would arbitrate under "the same rules of procedure as if it were conducted by and under the rules of the AAA." One can only speculate as to the reason the parties chose not to refer to Association rules and administration directly. Whatever the reason, the clause brought only one result—four separate court actions to determine threshold procedural questions, while the dispute which one party sought to arbitrate is still unresolved!

In short, the original intention of the parties to resolve controversies quickly and privately was frustrated by an ineffective arbitration clause. The error lay in not realizing that there is no such thing as "AAA rules" without AAA administrative procedure, for those rules prescribe certain functions to be performed by the Association, especially its tribunal clerks. It was precisely at this point that the parties came to grief.

One of the issues before New York Supreme Court Judge Henry J. Latham, for instance, was whether a court-appointed arbitrator's notice of hearing was valid. That notice had been given in accordance with the New York Arbitration Statute. But the respondent pointed out that the statute also requires that notice of hearings be given in a manner consistent with the agreement of the

parties. As the arbitration clause contained some reference to AAA rules, he argued, no notice was valid unless it was sent out by a tribunal clerk, under Section 20 of AAA's Commercial Arbitration Rules. Such notice was, of course, an impossibility where the parties chose not to leave room for AAA administration.

When parties negotiate a contract and include an arbitration clause, it can not always be known which party will be the claimant in a future dispute and which the respondent. Thus, it is presumed that they are equally interested in quick and practical determination of controversy. But when a dispute does arise, it frequently happens that the claimant is more aggressively interested in a speedy decision; the respondent may believe that advantages for him lie in delay. In saying this, we make no moral judgments. Indeed, particularly in trades where arbitration clauses are standard features of sales contracts, a company may be at one and the same time cast in the role of anxious claimant, with respect to one party, and reluctant respondent, with respect to another. Arbitration is an adversary proceeding, in which each party pursues the strategy that suits his purposes best.

(*Continued on Page* 95)

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ARBITRATION OF WORK RULES DISPUTES

by Pearce Davis

In recent years, union-management disputes concerning a varied group of plant practices known as "work rules" have been forcefully brought to the attention of arbitrators and the general public. The public has learned about this newly emphasized area of labor-management differences largely through press appeals for support by companies and unions. On these occasions, the petitioners have characteristically either been engaged in work stoppages arising, at least in part, from such disagreements or have been threatened with them. Understandably, such appeals for public support have not always been phrased in the language of pure fact and detached analysis. As a consequence, the average citizen today is more emotionally involved than understanding of these problems. Arbitrators, on the other hand, have become acquainted with such controversies in the course of deciding arbitration cases submitted to them for adjudication. Even arbitrators, however, are unequally familiar with "work rules" disputes. Those who specialize in industries whose contracts have been fertile in production of these disputes have had much experience in this area. Other arbitrators, certainly the majority, have encountered these disputes only occasionally.

The underlying circumstance that has given rise to "work rules" disputes actually has existed for a considerable period of time. It originated with the inclusion in some union-management contracts of a general clause providing, in very broad terms, for guaranteed continuation of all existing and customary practices in the plant for the duration of the collective bargaining agreement. As usually phrased, this guarantee was so inclusive as to apply, potentially, to practically every subject dealt with in the contract. The basic provisions in a well-known example of what is most accurately described as a "guaranteed work practices" clause states:

> The term 'local working conditions' as used herein means specific practices or customs which reflect detailed application of the sub-

ject matter within the scope of wages, hours of work or other conditions of employment and includes local agreements, written or oral, on such matters. It is recognized that it is impracticable to set forth in this Agreement all of these working conditions, which are of a local nature only, or to state specifically in this Agreement which of these matters should be changed or eliminated. The following provisions provide general principles and procedures which explain the status of these matters and furnish necessary guideposts for the parties hereto. . . .

Should there be any local working conditions in effect which provide benefits that are in excess of or in addition to the benefits established by this Agreement, they shall remain in effect for the term of this Agreement, except as they are changed or eliminated by mutual agreement or in accordance with [the] paragraph . . below. . . .

The preceding illustration is from a basic steel industry contract. Closely similar clauses are to be found in steel fabrication contracts. Other contract provisions providing essentially the same commitments have established guaranteed work practices in certain other industries. It is important to emphasize that these contract provisions did come into existence by *agreement;* no governmental act, no outside compulsion required work practices obligations to be undertaken. Presumably, of course, these provisions were accepted in consideration of valuable concessions which, at the time at least, appeared to warrant their acceptance.

Guaranteed Work Practices and Industrial Change

When work practices guarantees were first written into contracts, it is highly probable that they were in no way injurious to management, to union, or to employees. The pledge, as it then appeared, was merely to continue doing tomorrow what had been done today. Nevertheless, even allowing for the advantage of hindsight, it would seem that it was hazardous even at the outset to have established work practices guarantees in the manner provided. Hazardous, that is, if laying a foundation for numerous future labor-management disputes be so considered.

In the first place, it is always hazardous to pledge to continue what is done today, regardless of the content of the future. If history teaches anything, it teaches that change is the rule of life, in economic life as well as human life. Secondly, there was hazard at the outset in establishment of work practices guarantees because there was little if

any specific knowledge and no specific agreement as to *what* practices were to be continued. It is probable that there was not a single pair of union and company bargainers that surveyed and codified the work practices that had been contractually perpetuated. Nor, we may surmise, has the situation changed substantially even today—or at least, not until very recently.

The progress of technological improvement—in plants under work practices guarantees as well as others—gradually outmoded and made obsolete the customary working procedures of the past. In the industries and plants that lived under guaranteed practices clauses, conflict inevitably rose between improvement of processes and the methods of earlier days. Management, endeavoring to maintain or improve competitive position and augment profits, of course sought to improve its production procedures. When it did so it was often confronted, for the duration of the collective agreement at least, by its pledge to stay with the past. Disputes inevitably arose concerning whether a bona fide work practice had existed in the past, concerning what was required by way of actual performance for customary practice to become established, concerning what circumstances were necessary under the contracts for waiver of the guarantee. At this point, arbitration became concerned with work practices issues.

There are several different types of guaranteed work practices cases that may be cited for illustration.

Category 1. Requested Continuation Of Established Work Practice. This is probably the most frequent work practice arbitration issue. Usually the basic contention of the union is that a particular plant or company procedure has the status of guaranteed work practice under the contract, management has changed it, and the union requests restoration.

Example 1

Maintenance personnel have in the past been regularly assigned to specific and different plant areas where they have remained on full-time assignment. Management, discovering that full-time maintenance was not required to be held constantly available in each plant area, established a centralized maintenance plan whereby maintenance workers were dispatched to particular trouble spots as needed. The evidence showed that the alleged past practice had in fact been consistently followed. Management made the change because the old system was wasteful and inefficent. There was no technological innovation which in itself required a new method of maintenance assignment. The arbitrator upheld the

union and ordered restoration of the prior method of maintenance assignment, even though he recognized its lesser efficiency, on the basis of the guaranteed work practices clause.

Example 2

Two groups of employees, one having a paid lunch period and one not, customarily ate together and began lunch at the same time. One group, the paid lunch employees, was expected to go back before the other; usually they did not do so and a practice of a 20-minute lunch period for them developed. The fact of this practice was established by the evidence. To facilitate getting the paid lunch employees back to work, the company required that their lunch period begin at a specific time and continue for not more than 10 minutes. The union argued that practice had established a 20-minute lunch period and that the company was prohibited from changing it by the guaranteed work practices clause. The company contended that it had never established the 20-minute lunch period as policy, had not sanctioned it, and that without official recognition the 20-minute period could not be held to be a valid local practice within the meaning of the contract. The arbitrator upheld the union, finding that the existence of an established work practice does not require "supervisory origination," that company sanction was created by knowledge and acquiesence on the part of management.

Example 3

In the third instance management undertook to combat absenteeism by depriving offending employees of an opportunity to work overtime on a sixth work day. The evidence demonstrated that an established practice existed for distribution of overtime that did not take account of the absence records of the workers. Because there was no basis for change in the customary "local working condition," the arbitrator rejected the new company policy and ordered continuation of the previously prevailing method of determining distribution of overtime.

Example 4

In another case, although the contract contained a guaranteed work practices clause, the company's elimination of a practice of leaving work stations early to wash up was determined not to be a contract violation. The alleged practice was found not to have been firmly established because management had never acquiesced in the custom, though enforcement on occasion had been lax, and had undertaken periodic campaigns against it.

Example 5

In a further case, management's reversal of a practice of granting excused time on Christmas Eve was held by the arbitrator not to

be a violation of a guaranteed work practices clause because the custom, though historically followed, was not contractually established. Company and union had agreed in the course of disposition of a prior grievance that past practice would not become binding on subsequent Christmas Eve scheduling.

Example 6

In this case, the union contended that termination of the company's long standing practice of giving turkeys to its employees on Thanksgiving and Christmas was a violation of the guaranteed work practices clause. Management maintained that it possessed the contractual right to terminate such "gifts" and that they did not come within the category of a guaranteed past practice. Here, the arbitrator held that the custom was not the type of practice contemplated in the guarantee but was, rather, in the nature of a gratuity above and beyond agreed compensation of employees.

The foregoing illustrations of course represent a very small sample of the many contractual subjects that have been involved in "work rules" arbitration. To afford some idea of the wide range of issues presented, the following additional topics may be mentioned: make-up time lost by bad weather; overtime premium pay; work assignment changes allegedly made necessary by an emergency; variation in customary summer work schedules; contracting out; combination of jobs under depressed production conditions; special forms of discipline for absenteeism; hours of work; ratio of helpers; reduction of jobs; crew sizes; holidays.

As far as I know, there has been no systematic statistical study of arbitration decisions within this category. I have the distinct though unscientific impression that many, perhaps the majority of the decisions, have been in favor of unions. That is, in many cases work practices have been continued by virtue of the guarantee clause. On occasion, either by implication or by direct charge (usually not made by the parties involved) arbitrators have been blamed for interpreting the guaranteed work practices clause "so as to prevent management from managing properly." This charge is both unfair and wholly unjustified, except possibly in rare instances. It was the parties, including management, that negotiated this inclusive clause into the contracts. Management itself must therefore carry the primary responsibility for any consequences that it considers undesirable. As we all know, parties create contract terms. Arbitrators may not modify such terms no matter what opinion they may hold of the propriety of the impact of their awards. It may be noted that numerous arbitrators of work practices disputes

have commented that they were aware of possible undesirable consequences of the awards that they were in the process of issuing but noted that they were required to find as they had because of the plain provisions of the contracts and the factual evidence presented.

Category 2. Revocation of Established Work Practices For Cause. The guaranteed work practices clause normally contains an "escape" provision. It states the basis upon which management may revoke an established work practice and institute a new one. Doubtless this "escape" provision reassured the original framers of the clause that they were not unduly handicapping management in its directive functions. The pertinent paragraph reads:

> The Company shall have the right to change or eliminate any local working condition if, as the result of action taken by Management under Section . . . Management, the basis for the existence of the local working condition is changed or eliminated, thereby making it unnecessary to continue such local working condition; provided, however, that when such a change or elimination is made by the Company, any affected employee shall have recourse to the grievance procedure and arbitration, if necessary, to have the Company justify its action.

It does not appear that the foregoing contract term has fully served the purpose that was originally contemplated for it. As far as I have been able to determine, companies have not attempted to "escape" via this provision with any great frequency. This, I would surmise, is partly because of the nature of the basic contract terminology and partly because of the facts of industrial life. Often there was no clear-cut or well-defined basis for instituting the particular practice originally. It was often difficult, therefore, to point to specific circumstances that had changed and it was usually difficult, consequently, to justify alteration of practice. Another factor that perhaps militated against this defense is the fact that the type of change that would make an established work practice clearly "unnecessary" is a major revision in equipment or productive process. And in the time interval normally involved, technological variations of the magnitude required have not ordinarily occurred. Then, too, perhaps management has not utilized the "escape" avenue with sufficient frequency. Finally, companies sometimes may not have been sufficiently alert to the appearance of a technological or process change which would have justified termination of old work practices. In some cases arbitrators have pointed out that management in this fashion "slept on its rights." In one instance,

an arbitrator deciding against the company stated: "The new equipment was brought into the plant as early as 1946. . . . Yet the Company continued to abide by the old crew relationship from 1950 to 1954 in spite of the supposedly lower workload for helpers. . . . The workload which supported this practice may have been far different from what it was in 1946 or 1948. But the Company's inaction during that period had in effect by 1954 founded the practice upon an entirely different workload."

Category 3. Established Work Practices In Conflict With Specific Contract Terms. A final category of arbitration issues involving the guaranteed work practices clause includes cases where an established work practice is cited by one party as a bar to compliance with a specific contract provision and the opposing party invokes the following final characteristic paragraph in the guaranteed work practices clause:

> In no case shall local working conditions be effective to deprive any employee of rights under this Agreement. Should any employee believe that a local working condition is depriving him of the benefits of this Agreement, he shall have recourse to the grievance procedure and arbitration, if necessary, to require that the local working condition be changed or eliminated to provide the benefits established by this Agreement.

In deciding such cases, which are not as frequently encountered as those in category 1, the arbitrator must weigh a specific contract provision against a binding practice given contractual status by the guaranteed work practices clause. As a general rule, the specific language of the agreement will carry dominant weight.

Some Practical Considerations In Work Rules Arbitration

It may be of interest to survey some of the practical problems that face arbitrators confronted by decision-making in work practices disputes. In those cases where mandatory continuation of an established practice is alleged, the evidence should demonstrate and the arbitrator should ascertain these conditioning elements:

1. The practice itself must be clearly defined. If it cannot be so described the case for its establishment is seriously weakened.
2. If the practice is well-defined, the evidence must show that it has been consistently followed for a substantial period. Although it is dangerous to generalize with respect to duration, a standard that

may be ventured is that the practice should have been followed for all or the greater part of life of the current contract and, preferably, under preceding contracts as well.

3. Consistency of application of the practice is crucial. In general, it would appear that a high level of consistency must be held to be necessary for a finding that the custom was truly established. It is important, too, that the alleged practice has been applied in a substantial number of instances, not on a mere handful of occasions.
4. Management representatives must have had continued knowledge of the practice. Acquiesence with full and frequent knowledge is sufficient for a finding of management sanction. Top management formal policy declarations are not normally necessary. Protests and admonitions by management against use of the practice are important considerations if management is to be supported in a claim of non-sanction.
5. There are differences of opinion among arbitrators as to whether a long continued practice is to be considered binding when management has made a prior and early reservation that the continuation of the practice will be dependent upon an annual management decision or review.
6. Some arbitrators have utilized the concept of "employee expectations" as a criterion for directing a continuation of practice. This concept would appear to be at least different in degree from the criterion of factually established practice. Employee expectations may be based upon something less than firm practice and, in any event, are potentially vague and highly expansible in their scope. It would seem that arbitrators should be most cautious in their use of this standard.
7. If there is a specific clause in the contract making obsolete past practices with respect to a *particular bargaining subject* and there is a positive clause in the contract dealing with the same subject, the limiting contract provision would appear to carry decisive weight. The final conclusion, however, might vary with the facts of particular cases, and here, again, arbitrators' opinions may vary somewhat.

In those work practices cases where the company contends that it has cause under the "escape" paragraph to terminate the old practice and institute a new one these criteria are important:

1. There must be a clear and definite basis for change or elimination of an established practice. It must be demonstrated that some in-

novation has occurred that justifies elimination of the old practice. In short, there must be "appropriate cause."

2. There must be a clear causal connection between the innovation and the practice that was or is to be eliminated. The one must be definitely related to the other.

3. Finally, and most important, the change in practice must have been made at or close to the time the innovation in process or procedure was introduced. An innovation can not be made and the practice changed long afterwards, if "appropriate cause" for elimination of a practice is to be found to exist.

The Deeper Issues In Work Rules Disputes

We would be taking only a surface view of work practices problems if we failed to recognize the deeper issues that underlie these conflicts. It is true that the arguments of the parties in the arbitration hearings are stated in terms of contract rights, contract privileges, and contract obligations. But there are stronger underlying motivations.

Quite naturally, employees desire to retain all the benefits that the union-management agreement affords them. Whether these benefits are large or small, whether they concern money income or rest privileges, workers, like human beings in other situations, want to achieve and retain what the believe to be rightfully theirs. Not only their pocketbooks but their sense of personal worth and dignity—their egos —are involved. But underneath all of this is the deepest force—the fear of unemployment, the fear of loss of the value of their skills that the prospect of technological unemployment brings.

We know from long experience that technological progress is necessary, desirable and inevitable. We know that this is the way our economic society has progressed to its present high level and we know, too, that this is the path to continued achievement. It is also indisputable that employee resistance has never succeeded in delaying, for long, technological advancement. Modern union leaders and most union members today realize these facts. At the same time, it is axiomatic that management must be free to manage. This freedom must exist to bring forth technological advancement, greater economic income, greater economic well-being, and greater national security. Management must be free to introduce cost-reducing improvements in order to increase profits for the owners and secure the firm's position among its industrial competitors. The motivations and goals of companies and

unions and employees are not incompatible. Indeed in the long run their objectives, fortunately, are identical. The problem of reconciliation is a matter of timing and adjustment.

Automation—that popular and stylish term for the most recent manifestation of the continuation of the industrial revolution—has placed in management's hands a powerful force for increased efficiency and productivity. Its progressive adoption will wash away the current "work rules" issues. Its progressive adoption, which will surely come, will magnify the employees' fundamental fear underlying the "work rules" disputes. The short-run conflict between progress and unemployment can and must be reconciled. The two trends can be made compatible by *controlled* impact of technological change, and *controlled* reutilization of expendable workers. And this control action should be undertaken *voluntarily* by companies and unions. Greater efficiency and greater national product is not a goal that we must achieve at supersonic speed. Indeed, it is a fair question as to whether our entire contemporary society has not made an unworthy fetish of speed, speed at all costs. Nor is greater efficiency and greater national wealth so valuable and so necessary to our well-being that we should approve their achievement on a free-wheeling basis—without regard to the human costs of unemployment and waste of skill. Such an approach would represent invalid social accounting and would be out of tune with the humanistic age in which we live.

NOTES ON PROPOSED REVISION OF THE NEW YORK ARBITRATION LAW*

by Jack B. Weinstein

I. *Nature of Revision*

The Advisory Committee on Practice and Procedure—instructed by the Temporary Commission on the courts and by the Legislature to completely review and revise the Civil Practice Act and Rules—recognized that New York arbitration law is basically sound. Our present statute accords with the principles underlying the Uniform Arbitration Act. It was primarily the articulation of these principles that Maynard E. Pirsig was commenting on when he characterized the New York provisions as a "hodge-podge of patchwork legislation, confusing and difficult to understand."

The proposed article does not differ markedly from the present law. Most of the changes are made to clarify and simplify existing provisions; procedures used by arbitrators and courts will remain substantially unchanged. Nevertheless, there were a number of difficult problems which had to be faced in drafting and I will speak of some of them at this time.

Before doing so, I would like to publicly express our Committee's deep gratitude for the assistance of the Arbitration Committees of the City Bar Association and of the New York County Lawyers Association and to Martin Domke of the American Arbitration Association. They patiently and meticulously reviewed each of our drafts and made many helpful suggestions, practically all of which were incorporated in the bill finally submitted to the legislature. Sen. Int. 26, Prs. 26, 4381 (1961) §§ 7501-7514. Four suggestions were made by the Committee of the City Bar Association in its report of March 23 of this year, which our Committee never had an opportunity to pass upon. I will comment on them in the course of this discussion.

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* Prepared for a Symposium on Arbitration at the Association of the Bar of the City of New York, April 18, 1961.

II. *Basic Provision*

So far as the esthetics of the draft are concerned, we can state some of the principles more simply and directly than does the present statute. This is an unremarkable achievement since the present provisions are the result of a series of accretions, understandable as part of the historic development, but no longer desirable. Thus, for example, the basic provision (C.P.L. § 7501) reads as follows:

> § 7501. Effect of arbitration agreement. A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award.

The number of words is substantially less than the number of lines presently needed to cover the same point (cf. proposed Rule 1258, arbitration of controversy involving infant or judicially declared incompetent) and the mere form of the statement may have a somewhat liberalizing effect.

It has been suggested (Wolf, Disclosure Proceedings Opposed, 18 Bar Bulletin, New York City Lawyers Association, 111, 113-114 [1960]) that the *Cutler-Hammer* case be specifically overruled by statute. The rule there stated was that "the mere assertion by a party of the meaning of a provision which is clearly contrary to the plain meaning of the words cannot make an arbitrable issue." The Advisory Committee considered this problem and preferred to leave the matter for further case law development. The New York Court of Appeals has been liberal in recent years in protecting the arbitration process. In the New York 2d series of reports, for example, there were 48 cases decided by that Court. Where the Special Term ruled against the arbitration, it was reversed in 84 percent of the cases that went to the Court of Appeals. Where Special Term ruled in favor of the arbitration, it was reversed in only 39 percent of the cases. A reading of the cases indicates a clear trend toward liberality. The recent *Grayson-Robinson* case (8 N. Y. 2d 133, 202 N. Y. S. 2d 303 (1960), indicating that the arbitrator's freedom to grant specific performance may be greater than that of the courts (although the courts, presumably, will be left with the problems of enforcement), is typical of an approach that ought, I think, to be viewed with some satisfaction by those of you who favor development of arbitration as a method of resolving disputes.

Moreover, if Judge Medina was right in *Robert Lawrence Com-*

pany v. Devonshire Fabrics (271 F.2d 402 (2d Cir. 1959), cert. granted 362 U.S. 909 (1959), dismissed by stipulation 364 U.S. 801 (1960), that the Federal Arbitration Law created a very liberal Federal substantive right to have arbitrators decide on the enforceability of a contract containing a valid arbitration clause, where interstate commerce is involved, then many cases in New York courts will be governed by the Federal rule. The state courts will enforce the Federal rule in interstate commerce cases and this will probably lead to a further liberalization of state law.

III. *Rule-Making Power*

One of the duties that was assigned to us by both the legislature and the Temporary Commission was, in the words of the Commission's direction, to "provide for a delegation of control of procedures and practices to the courts over rule-making power." (Parenthetically, I note that our bills would have been passed at this last session had the Senate Codes Committee not insisted that rules be eliminated in favor of complete statutory control of procedure. Naturally, we preferred to see the bills die in committee rather than have our work so perverted.) In making a division between rules and statutes the Committee laid down as its basic principle that "details of procedure should be governed by judicially-made rules, while basic policies and procedures having direct effect on substantive rights ought to be controlled by statutes."

On this basis we decided that the arbitration provision ought to be embodied in an integrated statute to be incorporated in the new Civil Practice Law. The procedures were spelled out in somewhat greater detail than was required for practice generally because these provisions would govern the activities of non-lawyers who acted as arbitrators. Since it was likely, too, that the arbitration provisions would be separately printed for their guidance, an attempt was made to have the arbitration article stand as independently as possible.

Several other factors shaped our decision to place the arbitration material in a statute. First, arbitration is essentially non-judicial. The courts serve only collaterally to assist by such means as enforcement of awards, stays and orders for discovery. We were aware, too, of the courts' historic antipathy to arbitration. Judge Medina, in *Robert Lawrence Company,* rightly characterized this "hostility of the judiciary" as "one of the dark chapters in legal history." (Id. at 406, 407.) This is a factor of diminishing importance since the development of modern arbitration statutes. Nevertheless, the Supreme Court of New

York and other courts have become increasingly aware of the effect of arbitration in skimming off the most interesting and important commercial and labor litigations. (Lawyers have not been as concerned since, typically, a lawyer will present the case to the arbitrator—who may himself be a lawyer.) At the same time, negligence litigation has been growing. Except in collision insurance cases where the question is which carrier will bear the burden, arbitration has as yet not made any inroads into the negligence field. This is to be expected since the only contact between the parties in most of these tort cases is the accident and resulting litigation.

Courts such as the New York Supreme Court have been left with negligence cases, and a sprinkling of administrative review, condemnation and non-litigated matrimonial cases as their chief business. In some counties the percentage of negligence cases approaches 100. In New York County, while the problem is somewhat less acute, it is, from the point of view of the judges, serious. It will be accentuated when, under the new constitutional provisions, the jurisdictional limit of the New York General City Court is raised to $10,000. The experience in the Federal courts since the minimum diversity jurisdiction was raised from $3,000 to $10,000, is that the proportion of commercial cases coming into the courts decreases. Commercial cases involve, in the main, liquidated damages, while the damages in negligence cases cannot be predicted by any precise tests and can rise to meet most minimum requirements. The experience since adoption of the readiness rule is, in this respect, interesting. It has apparently succeeded in driving some commercial cases out of the courts while the number of negligence cases remains substantially unaffected.

Our courts have attempted to regain some of this commercial business in a number of ways. First, they have preferred commercial cases over negligence cases, so that they could announce that it is only the negligence jury cases which are delayed. This has been done by putting a disproportionate amount of judicial manpower into commercial cases as compared to negligence cases. While I am sympathetic to the problems the judges face, this practice, in my opinion, is not justifiable. The courts have also discriminated in favor of commercial cases by failing to apply calendar classification rules to them, so that a commercial case which could be tried in a lower court is allowed to remain in the Supreme Court. This, too, seems unjustified, although it is constitutionally within the power of the Supreme Court which has general jurisdiction in all cases. The judges have also sought to reduce the

burden on commercial cases somewhat by pre-trying only negligence cases. This also seems to me to be a wrong decision, since pretrials—aside from their settlement capabilities—can probably be most effective in non-negligence cases.

Another example of the attempt to woo back business from the arbitrators is in the recent enactment of Sections 218-b and 218-c of the Civil Practice Act, N.Y. L. 1961, c.863. In effect, these new sections permit contracting parties to provide for a procedure closely approximating arbitration procedure, except that the arbitrator would be a Supreme Court Justice, instead of a private one chosen by the parties. They are designed to eliminate such barriers to quick decisions as the "technical rules of evidence." Despite the urgings of the State Legislation Committee of the Association of the Bar that we incorporate them in our proposals, our Committee refused to do so. The Judicial Conference Reports on the proposals explicitly acknowledge that they were designed to regain arbitration business. See, e.g., Fifth Annual Report 97 (N.Y. Leg. Doc. 98, 1960). I would expect that this new law will have practically no effect. My own feeling is that arbitration clauses are not adopted simply on the ground that the courts provide too many protections and operate too meticulously; the protections the courts give litigants are desirable. To the extent that any "technical" rule of evidence or other procedure is unnecessary, it ought to be eliminated in all cases; if it serves justice, then the courts ought not ignore it.

The approach embodied in new sections 218-b and c ignores some of the reasons arbitration has grown. It is undoubtedly true that part of the trend toward arbitration has been due to a distorted image of the courts as clogged with litigation and ineffective. But people use arbitration for many reasons. Privacy is one which the courts ought not attempt to provide. The desirability of obtaining a "fair" decision, one which comports with the subtle expectations of the trade rather than with the necessarily grosser rules of substantive law, is another. Judges should not attempt to ignore substantive law to the same extent that arbitrators are expected to.

Another approach which our courts have not yet tried to regain business from the arbitrators is the appointment of a panel of commercial judges somewhat like that used in England with varying success. It is unlikely that our courts would seriously consider such a proposal since it is the commercial cases which have prestige and interest, and there are few of our judges who would be willing to have these cases routinely assigned to their brethren.

IV. *Characterization of Arbitration As A Special Proceeding*

A. Present and Proposed Law

A number of difficult problems arise because of the extra-judicial quality of the arbitration proceeding. Section 1459 of the present Civil Practice Act provides that an arbitration "shall be deemed a special proceeding" and that an application to the court "shall be made and heard in the manner provided . . . for the making and hearing of motions." New York courts, construing that provision, have taken the position that the arbitration is a special proceeding even before any application to the court is made. See, e.g., *Matter of Adam Consol. Industries Inc.* (*Miller Bros. Hat Co.*), 6 App. Div. 2d 515, 180 N. Y. S 2d 507 (First Dep't. 1958); *Aarons v. Local* 32-E, 82 N. Y. S. 2d 262 (Sup. Ct. 1948); *Grand Central Theatre v. Moving Picture Machine Op. Union,* 69 N. Y. S.2d 115, affd. 263 A.D. 989. (First Dep't. 1942); cf. *Marchant v. Mead-Morrison Mfg. Co.,* 29 F.2d 40 (2d Cir. 1928), cert. den. 278 U.S. 655 (1929); *Minkoff v. Budget Dress Corp.,* 180 F. Supp. 818 (D. C. N. Y. 1960). They have given arbitration the attributes of a pending judicial proceeding from the time the notice of arbitration is served.

The Advisory Committee's proposal states that "a special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action." C.P.L. § 7502. It further provides that "All subsequent applications shall be made by motion in the pending action or the special proceeding." Id. Thus, the arbitration would not take on the character of a judicial proceeding until the first application arising out of it is made to a court, whether by institution of a special proceeding or by motion in a pending action. See Second Preliminary Report N. Y. Advisory Committee on Practice and Procedure 134-135 (Leg. Doc. No. 13, 1958). Compare Sen. Int. 26, Pr. 26 (1961) with Sen. Int. 26, Pr. 4381 (1961).

Flexibility of characterization of the ensuing judicial procedures is intended. If the first application is made in a pending action subsequent motions may be made in that action. The provision does not, however, preclude commencement of a subsequent special proceeding in connection with the arbitration. See Advance Copy Final Report N.Y. Advisory Committee on Practice and Procedure, A-238 (Leg. Doc. No. 15, 1961). In accordance with the Advisory Committee's general policy that technical and non-prejudicial errors be disregarded, it is intended that the court should not necessarily be bound by the

label of motion of special proceeding put on his application by the litigant. (cf. C.P.L. § 102 (c)).

B. Removal to the Federal Court

The importance of these matters of characterization is well illustrated in cases involving removal to the Federal courts. The Federal law provides that a case is not ripe for removal unless it has been "brought" and is "pending" in a state court (28 U.S.C. § 1441 (a)), and that the "petition for removal . . . shall be filed within twenty days after the receipt by the defendant . . . of a copy of the initial pleading."

Judge Dimock, in a recent decision, refused to go so far as the New York courts in holding that the arbitration was a judicial proceeding from the time arbitration was commenced. *Minkoff v. Budget Dress Corp.*, 180 F. Supp. 818 (D. C. N. Y. 1960). The arbitration proceeding was "brought" and "pending" in the court, he held, for purposes of the removal statute, only from the time that a motion to stay the arbitration was made to a court. As to the "initial pleading" from which the time to move for removal was to be measured, Judge Dimock felt that, except for the fact that the word "pleading" connotes a court, the initial pleading would seem to be the complaint filed with the impartial industry chairman which initiated the arbitration proceeding. Since the arbitration was not a pending judicial proceeding at that time, however, the complaint filed with the impartial chairman could not so qualify at the time of filing. In Judge Dimock's view, it did not become the "initial pleading" in contemplation of the law, until the date that the motion to stay the arbitration was made and the time to move for removal was, accordingly, measured from that date. The party serving the complaint with the impartial chairman—rather than the party who applied to the court for a stay—was considered, for removal purposes, the plaintiff. When one of the parties moved for a stay in the state court, therefore, the party who had begun the arbitration and who opposed the stay—not being "defendant" in a state action or proceeding under subsection (b) of section 1446 of title 28—could not move for removal. *App. of Minkoff v. Budget Dress Corp.*, 180 F. Supp. 818 (D. C. N. Y. 1960). See also *App. of Rosenthal-Block China Corp.*, 183 F. Supp. 659 (D. C. N. Y. 1960), stay den. 278 F.2d 713 (2d Cir. 1960); *Matter of Hall*, 183 F. Supp. 891 (D. C. N. Y. 1960).

Our proposal accords with Judge Dimock's conclusion that the first application to the court commences the proceeding for purposes of time to remove. It does not accord with his conclusion that the per-

son who started the arbitration rather than the person who first applied to the courts is the plaintiff. This does not mean, of course, that the District Court in New York would change its view if our statute is adopted. Characterization of matters for purposes of the removal statutes depends upon Federal, not state, decisions. Nevertheless, our proposals would certainly permit the District Court to take a fresh view of the matter.

C. Appealability

Questions of appealability may be affected by whether each application to a court relating to an arbitration is considered a separate special proceeding or part of a continuing proceeding. Although the Civil Practice Act indicates that the whole arbitration is one special proceeding, the courts have interpreted many of the applications made in the course of the arbitration as instituting independent special proceedings. Thus, for example, the New York Court of Appeals, which has a very strict rule preventing appeals from "intermediate" orders, has held that orders granting or denying a stay of arbitration are final. (Some distinctions have apparently been drawn based upon whether the motion to stay is made in the same court in which the action is pending or in some other court.) A proceeding to require one of the parties to proceed to arbitrate is considered a special proceeding and an order either granting or denying a motion for such relief is final. See, generally, Cohen and Karger, Powers of the New York Court of Appeals, 129-130, footnote 11 (Rev. Ed. 1952); cf. Sturges, Cases on Arbitration Law, 293 footnote 49 (1953). Since an order which has the effect of permitting or requiring the arbitration to proceed is analogous to an order for a trial, the Court of Appeals decisions do not accord with its refusal to hear appeals from orders requiring or permitting trials.

Under the Advisory Committee proposals, as made to the 1961 legislative session, in which there were few limitations on appeals to the Appellate Division, the appealability of orders to the Appellate Division would remain unaffected in arbitration matters. Appeals to the Court of Appeals, however, would be reviewable only on the appeal from the final determination in the "special proceeding" commenced by the first application to the court.

I assume that the Court of Appeals would interpret our provisions to permit an appeal where a court below took action which, in effect, cut off the possibility of an arbitration—i.e., one which denied a stay of an action to permit arbitration or which refused to appoint an arbi-

trator for non-discretionary reasons. On the other hand, where arbitration was, in effect, ordered, the Court of Appeals would treat the court order, I suppose, as non-final in much the same way as it treats an order requiring a new trial. Any mistake of law would be appealable only after the arbitration was completed and an order entered upon the arbitrator's award. Such a limitation on intermediate appeals seems to me sound. It accords with our general procedure eliminating intermediate appeals to the Court of Appeals except at the end of the litigation. It would reduce the possibility of delaying arbitrations through successive appeals. My own preference would be to go further and limit appeals to the Appellate Division, but the bench and bar at the moment seem to prefer rather free access to that court.

V. *Discovery and Subpoenaes*

We originally proposed that all of the disclosure procedures applicable to an action—including extensive depositions, interrogatories, and discovery of documents—be available to any party in an arbitration in the discretion of the arbitrators. The present power of arbitrators to subpoena records for discovery under Section 406 C. P. A. is doubtful. *In re Ebbets Estate,* 155 Misc. 870, 280 N. Y. S. 710 (Surr. Ct. 1935); cf. 19 Jud. Council Rep. 196 (1953). While there was some support for our proposal at the public hearings, the weight of informed professional opinion opposed it. On reconsideration, we decided tors would probably be unable to exercise proper control. Disclosure Procedures will be available only on court order. The courts will undoubtedly continue to be reluctant to order disclosure except "under extraordinary circumstances." *Application of Katz,* 3 App. Div. 2d 238, 160 N.Y.S. 2d 159 (First Dept 1957).

The arbitrators will retain broad powers to issue subpoenas requiring production of documents or testimony before them. *In re Landogger,* 269 A.D. 736, 54 N.Y.S. 2d 701 (App. Div. First Dep't 1945), modifying 54 N. Y. S. 2d 76 (Sup. Ct. 1945); *Matter of Re-Anne Mfg. Corp.,* 1 Misc. 2d 717, 149 N. Y. S. 2d (Sup. Ct. 1955). Arbitrators can presently refuse to subpoena records and they will be sustained unless there is a clear showing that the records were relevant and necessary—i.e., that the arbitrators' refusal amounted to a refusal to hear evidence pertinent and material to the controversy. *A. D. Juilliard and Co., Inc. v. Baitch and Castaldi, Inc.,* 2 Misc. 2d 753, 754, 152 N. Y. S. 2d 394, 396 (Sup. Ct. 1956); *Knickerbocker Textile Corp. v. Kingsley Fashions,* 80 N. Y. S. 2d 425 (Sup. Ct. 1948); *Milli-*

ken Woolens, Inc. v. Weber Knit Sportswear, 20 Misc. 2d 504, 192 N. Y. S. 2d 408 (Sup. Ct. 1959), rev'd on other grounds and appeal pending, 8 N. Y. 2d 1025, 8 N. Y. 2d 1157.

Of course, production before an arbitrator rather than disclosure in private is not entirely satisfactory from the point of view of the party who would like to know in advance what it is the witness or the document will say. Nevertheless, the problem is not as acute as it would be at a court trial. Since the rules of evidence are not applicable, and relevancy is broadly construed, it is unlikely that the arbitrators will refuse to accept any document or testimony which would be available through even the broadest disclosure devices.

The Committee on Arbitration of the Association of the Bar has objected to our proposal that a single arbitrator or an attorney of record in the arbitration have power to issue subpoenas. It would limit that power to a majority of the arbitrators. Because we have provided that the attorney himself may issue a subpoena, it makes little difference whether an individual arbitrator or a majority are also given the power. The basic problem, therefore, is whether attorneys of record in an arbitration should be permitted to issue subpoenas. I think that they should be. This belief accords with the general approach to subpoenas in our proposals. We have provided, as a part of an integrated subpoena practice and over the opposition of some administrative agencies, that in administrative hearings, an attorney of record be permitted to subpoena witnesses and documents without seeking a subpoena from the agency in the first instance. It is true that this practice may lead to some abuses and that an arbitrator or hearing officer is less likely than a court to be able to control abuses. Nevertheless, we believe that the danger is far outweighed by the convenience to the overwhelming number of honest and trustworthy attorneys who ought to be able to handle their litigation, whether before a court, administrative agency, or arbitrator, with as much flexibility and with as few inconveniences as possible.

VI. *Intention to Arbitrate*

The Association of the Bar of the City of New York's Committee on Arbitration recently suggested that the proposal in proposed section 7503(c) incorporating present section 1458(2) of the Civil Practice Act, and providing for a notice of intention procedure, ought to be omitted. Our Committee would not have been adverse to this suggestion. In our Committee's Second Report, containing our original arbi-

tration proposals, we did omit this procedure and as justification we noted that (p. 136):

> The provision in section 1458(2) that a party may serve his opponent with a notice of intention to arbitrate is not presently used in practice; with the speedy motion available to compel arbitration there is no need for it. If a party proceeds to ex parte arbitration, his opponent may raise the issues of the existence of the agreement or an arbitrable dispute by a motion to stay the arbitration, by opposing the party's later motion to confirm the award, or by a motion to vacate the award. If the proponent desires to bar his opponent from raising these issues, however, he may make a motion to compel arbitration. This simplification conforms to the proposed Uniform Act. Only one jurisdiction, other than New York, presently requires the additional step of a notice of intention to arbitrate.

As a result of communications from the bar objecting to its elimination, the procedure was reintroduced. See Advance Copy Fourth Preliminary Report, N.Y. Advisory Committee, A-243 (Leg. Doc. No. 20, 1960). This comment of the City Bar's Arbitration Committee is the first notice I have had that there was any sentiment in the bar favoring our original draft in this respect. I myself do not think the matter of very much importance, since the procedure appears to be little used. The suggestion of the Arbitration Committee that the procedure only be permitted if the arbitration is commenced within ten days of the date of service of such notice seems sensible, but it would somewhat complicate the practice.

The only other suggestion to amend our present draft made by the City Bar Association's Arbitration Committee is that the modification of award provision (C.P.L. section 7509) include a clause requiring delivery of copies to the parties. This seems unobjectionable, although I would have interpreted our provisions as requiring this step.

VII. *Conclusion*

Our proposals have been studied extensively, and revised to reflect the many excellent suggestions we have received. The consensus of those who have studied them appears to be that they would constitute an improvement. Whether this is so can be determined only by you who are experts in this field. Of one thing I am certain: they do not constitute the culmination of procedural reform in this field. They

can be improved. Adoption and continuing improvement depend upon your efforts. If your unselfish and extraordinary aid to our committee is indicative, it is clear that the segment of the bar interested in arbitration will continue to fulfill its professional responsibility for improving the administration of justice.

PROPOSED NEW YORK ARBITRATION STATUTE*

ARTICLE 75

ARBITRATION

* NEW YORK SENATE BILL INTRO. 26, PRINT. 4381 (1961). For notes of the New York Advisory Committee on Practice and Procedure, see that Committee's Second Report at pp. 130-151 (N. Y. Leg. Doc. No. 13, 1958); Advance Copy of Fourth Report at pp. A-241—A-245 (N. Y. Leg. Doc. No. 20, 1960); Advance Copy of Final Report at pp. A-237—A-251 (N. Y. Leg. Doc. No. 15, 1961).

§ 7501. Effect of arbitration agreement. A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award.

§ 7502. Applications to the court; venue; statutes of limitation. (a) Applications to the court; venue. A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action. The proceeding shall be brought in the court and county specified in the agreement; or, if none be specified, in a court in the county in which one of the parties resides or is doing business, or, if there is no such county, in a court in any county; or in a court in the county in which the arbitration was held. All subsequent applications shall be made by motion in the pending action or the special proceeding.

(b) Limitation of time. If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court as

provided in section seventy-five hundred three or subdivision (b) of section seventy-five hundred eleven. The failure to assert such bar by such application shall not preclude its assertion before the arbitrators, who may, in their sole discretion, apply or not apply the bar. Except as provided in subdivision (b) of section seventy-five hundred eleven, such exercise of discretion by the arbitrators shall not be subject to review by a court on an application to confirm, vacate or modify the award.

§ 7503. Application to compel or stay arbitration; stay of action; notice of intention to arbitrate. (a) Application to compel arbitration; stay of action. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section seventy-five hundred two, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

(b) Application to stay arbitration. Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section seventy-five hundred two.

(c) Notice of intention to arbitrate. A party may serve upon another party a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within ten days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. Such notice shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitra-

tion must be made by the party served within ten days after service upon him of the notice or he shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested.

§ 7504. Court appointment of arbitrator. If the arbitration agreement does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator.

§ 7505. Powers of arbitrator. An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas. An arbitrator has the power to administer oaths.

§ 7506. Hearing. (a) Oath of arbitrator. Before hearing any testimony, an arbitrator shall be sworn to hear and decide the controversy faithfully and fairly by an officer authorized to administer an oath.

(b) Time and place. The arbitrator shall appoint a time and place for the hearing and notify the parties in writing personally or by registered or certified mail not less than eight days before the hearing. The arbitrator may adjourn or postpone the hearing. The court, upon application of any party, may direct the arbitrator to proceed promptly with the hearing and determination of the controversy.

(c) Evidence. The parties are entitled to be heard, to present evidence and to cross-examine witnesses. Notwithstanding the failure of a party duly notified to appear, the arbitrator may hear and determine the controversy upon the evidence produced.

(d) Representation by attorney. A party has the right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings which have not taken place. This right may not be waived. If a party is represented by an attorney, papers to be served on the party shall be served upon his attorney.

(e) Determination by majority. The hearing shall be conducted by all the arbitrators, but a majority may determine any question and render an award.

(f) Waiver. Except as provided in subdivision (d), a requirement of this section may be waived by written consent of the parties and it is waived if the parties continue with the arbitration without objection.

§ 7507. Award: form; time; delivery. Except as provided in section seventy-five hundred eight, the award shall be in writing, signed and acknowledged by the arbitrator making it within the time fixed

by the agreement, or, if the time is not fixed, within such time as the court orders. The parties may in writing extend the time either before or after its expiration. A party waives the objection that an award was not made within the time required unless he notifies the arbitrator in writing of his objection prior to the delivery of the award to him. The arbitrator shall deliver a copy of the award to each party in the manner provided in the agreement, or, if no provision is so made, personally or by registered or certified mail, return receipt requested.

§ 7508. Award by confession. (a) When available. An award by confession may be made for money due or to become due at any time before an award is otherwise made. The award shall be based upon a statement, verified by each party, containing an authorization to make the award, the sum of the award or the method of ascertaining it, and the facts constituting the liability.

(b) Time of award. The award may be made at any time within three months after the statement is verified.

(c) Person or agency making award. The award may be made by an arbitrator or by the agency or person named by the parties to designate the arbitrator.

§ 7509. Modification of award by arbitrator. On written application of a party to the arbitrators within twenty days after delivery of the award to the applicant, the arbitrators may modify the award upon the grounds stated in subdivision (c) of section seventy-five hundred eleven. Written notice of the application shall be given to other parties to the arbitration. Written objection to modification must be served on the arbitrators and other parties to the arbitration within ten days of receipt of the notice. The arbitrators shall dispose of any application made under this section in writing, signed and acknowledged by them, within thirty days after either written objection to modification has been served on them or the time for serving said objection has expired, whichever is earlier. The parties may in writing extend the time for such disposition either before or after its expiration.

§ 7510. Confirmation of award. The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section seventy-five hundred eleven.

§ 7511. Vacating or modifying award. (a) When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that

(i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or

(ii) a valid agreement to arbitrate was not made; or

(iii) the agreement to arbitrate had not been complied with; or

(iv) the arbitrated claim was barred by limitation under subdivision (b) of section seventy-five hundred two.

(c) Grounds for modifying. The court shall modify the award if

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

(d) Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court.

(e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.

§ 7512. Death or incompetency of a party. Where a party dies after making a written agreement to submit a controversy to arbitration, the proceedings may be begun or continued upon the application of, or upon notice to, his executor or administrator or, where it relates to real property, his distributee or devisee who has succeeded to his interest in the real property. Where a committee of the property or of the person of a party to such an agreement is appointed, the proceedings may be continued upon the application of, or notice to, the committee. Upon the death or incompetency of a party, the court may extend the time within which an application to confirm, vacate or modify the award or to stay arbitration must be made. Where a party has died since an award was delivered, the proceedings thereupon are the same as where a party dies after a verdict.

§ 7513. Fees and expenses. Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including attorney's fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. The court, on application, may reduce or disallow any fee or expense it finds excessive or allocate it as justice requires.

§ 7514. Judgment on an award. (a) Entry. A judgment shall be entered upon the confirmation of any award.

(b) Judgment-roll. The judgment-roll consists of the original or a copy of the agreement and each written extension of time within which to make an award; the statement required by section seventy-five hundred eight where the award was by confession; the award; each paper submitted to the court and each order of the court upon an application under sections seventy-five hundred ten and seventy-five hundred eleven; and a copy of the judgment.

ARBITRATION AND OCEAN MARINE CARGO SUBROGATION

by George C. Garbesi

One important phase of both foreign and domestic ocean commerce is subrogation by the cargo underwriters against carriers whose fault is the primary cause of the loss. A shipper insures his merchandise, which is to move in ocean commerce, against damage or loss from all or any of specifically named causes while moving from his warehouse to that of the consignee or possibly from point of loading to point of discharge from the ship. Assuming a loss has occurred from an insured peril, the cargo underwriter pays the party in interest and then makes claim against any person whose fault, he feels, may have caused the loss. This might be the ocean and/or inland carrier and/or an intervening warehouseman. If the person against whom a claim is made is insured against liability for this type of loss, his underwriters would be required to defend and indemnify him. Thus in ultimate effect one underwriter is paying another although any legal action is generally in the name of the principals.

Considering the possible liability of the ocean carrier for the loss, there is often controversy as to whether the ship or shipowner is legally responsible and, if so, to what extent, the controversy being resolved by litigation. The legal questions involved are not generally complex, and the facts tend to fall into a pattern not overly complicated. However, in view of the fact that the controversy frequently involves widely diverse locations (sometimes in different countries) and mobile witnesses (crews of ships), the cost of proof in court, for both contestants, is high. This is largely the result of insistence by courts upon evidence not hearsay in nature in proving claims and defenses that are documented by records such as survey reports, log books, notes of protest, etc. These documents are all hearsay but are likely to be more reliable than most hearsay evidence because they are kept in the regular course of business, for facilitating commerce, safety of navigation, etc., not in anticipation of litigation. It is probable that substantially the same results would be realized at less ex-

pense to both cargo and ship underwriters if arbitration, with its more liberal rules of evidence, were more widely utilized as a means of settling these disputes.

The Carriage of Goods by Sea Act

The rights and liabilities of the parties to an ocean marine contract of carriage (bill of lading) of goods moving between United States and foreign ports are governed primarily by the Carriage of Goods by Sea Act (46 U.S. Code 1300-1315).

This statute requires a carrier to use due diligence to provide a seaworthy ship properly manned, equipped and supplied, to provide cargo compartments which are safe to receive cargo, to issue a bill of lading showing cargo marks, quantity and apparent condition which constitutes prima facie proof of its contents, and which must be a "shipped" bill on demand of the shipper.

The shipper warrants the accuracy of his representation concerning identity, quantity, quality and marks, and must indemnify the shipowner against loss or damage resulting from a breach of warranty.

The consignee is required to give notice of loss or damage to cargo before accepting delivery from the ship or, in case of concealed damage or loss, within three days of receipt. Failure to comply with this section raises a presumption of delivery in the same condition as when received. The limitation of time to sue is one year.

The carrier is specifically protected from liability for losses caused by error in navigation or management of the ship, fire not caused by fault or with privity of shipowner, Act of God, peril of the sea, war, public enemies, constituted authority, quarantine, fault of shipper, strikes, riots, saving of life or property at sea, inherent vice, insufficiency of packing or marking, latent defects or any other flaw not caused by fault or privity of the shipowner. The shipowner's liability for loss or damage is limited to $500 per package or freight unit.

The Bill of Lading

The bill of lading is the contract between the shipper and the carrier, but it may not contain any provisions in controvention of the Carriage of Goods by Sea Act. An examination of the Carriage of Goods by Sea Act and the cases construing it fails to disclose any conflicts between the act and the incorporation of an arbitration clause in the bill of lading.

The United States Arbitration Act

Prior to the enactment, in 1925, of the United States Arbitration Act,[1] the various state arbitration acts and the body of the state common law was applicable to marine transactions.[2] The passage of that act, however, would appear to have pre-empted the field, leaving the federal act alone in the field of ocean transportation.[3] This does not mean that a state court may not enforce marine arbitration agreements.[4] Notwithstanding the existence of the federal act, a plaintiff may still bring his action in a state court under the "saving to suitors" clause,[5] but state courts are required to apply the federal statute[6] and are bound by the federal decisions construing it.

The United States Arbitration Act specifically embraces ocean bills of lading.[7] Although the language of that section is not clear, it has been construed to embrace the entire maritime jurisdiction of the United States,[8] and thus would also be applied to water movements in coastwise, inter-coastal and even inland trade. In view of the explicit language of this section, it is clear that the courts would enforce arbitration clauses in bills of lading.

Under the United States Arbitration Act, a court must, upon application, stay court proceedings brought in contravention of the arbitration agreement,[9] and may compel arbitration upon demand of either party.[10]

There is no serious problem where the agreement is to arbitrate in the United States. But where the agreement is to arbitrate abroad, the situation is not so clear. A court proceeding here may be stayed, thus leaving the parties with only arbitration abroad as a remedy,[11] but the courts do not feel that the wording of the statute gives them the power affirmatively to order arbitration abroad.[12] One state court,

1. 9 U.S.C. 1-15.
2. The Hamilton, 207 U.S. 398. Red Cross Line v. Atlantic Fruit Co., 233 N.Y. 373, 264 U.S. 109 (1924).
3. Lindgren v. United States, 281 U.S. 38.
4. Shanferoke Coal and Supply Co. v. Westchester Service Corp., 70 F. 2d. 298.
5. 28 U.S.C. 1333 (1).
6. Seaboard Airline Railway v. Horton, 233 U.S. 492.
7. 9 U.S.C. 1.
8. Marine Transit Co. v. Dreyfuss, 284 U.S. 263.
9. 9 U.S.C. 3.
10. 9 U.S.C. 4.
11. Shanferoke Coal and Supply Co. v. Westchester Service Corp., 293 U.S. 449 (1935).
12. The Silverbrook, 18 F. 2d 144.

at least, has ordered arbitration abroad,[13] but in situations involving maritime transactions, a state court would, as stated above, be required to apply the Federal Act and Federal decisions construing it, and would refuse to order arbitration abroad. One possible solution to this problem would be to provide in the contract for arbitration under the rules of an arbitration agency (e.g. the American Arbitration Association) whose rules provide for ex parte proceedings. Then a recalcitrant defendant could not evade an award being made against him abroad, and this award might thereafter be enforced here.[14] It is not certain that other state courts and the federal courts will follow the lead of the New York Court of Appeals in this type of situation, but the reasoning of this decision has much in logic to commend it, and it seems probable that they will.[15]

Arbitration clauses have been widely used in charter parties in the past,[16] but judging from the dearth of authority, they apparently have not been used in bills of lading. Assuming a bill of lading was issued incorporating by reference a charter party which contained an arbitration clause, two problems become apparent: 1.) Does the arbitration clause in the charter party become part of the bill of lading contract? 2.) May one to whom the bill of lading has been negotiated enforce the arbitration agreement? Courts have been quite chary of enforcing arbitration clauses incorporated by reference in another instrument without specific reference to arbitration.[17] Assuming that the clause is held to be incorporated by reference, the second question can probably be answered in the affirmative.[18] This second question also involves the question of real party in interest.[19] Would the owner of the bill of lading, or the cargo underwriter who has paid the loss, be the real party in interest? And would the cargo underwriter be able to enforce the arbitration agreement as an assignee by operation of law? The *Bernstein* case, cited above, is probably authority for the enforcement of the arbitration agreement by the underwriter.

Jurisdiction in a marine transaction may be either *in rem* or *in personam*. The *in rem* proceedings against the vessel provide a

13. Nippon Ki-Ito Kaisha v. Ewing Thomas Corp., 313 Pa. 442.
14. Gilbert v. Burnstine, 255 N.Y. 348.
15. See Mulcahy v. Whitehill, 48 F. Supp. 917.
16. See e.g. Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109.
17. Matter of American Rail and Steel Co., 308 N.Y. 577.
18. Arnold Bernstein Shipping Co. v. Tidewater Commercial Co., 84 F. Supp. 948.
19. Rule 17, F.R.C.P.

cargo owner plaintiff with valuable security for payment of this claim. This remedy has been incorporated into the Federal Arbitration Act,[20] and it has been held that a party to an arbitration agreement cannot contract away that right.[21]

In personam jurisdiction, particularly in marine matters, is a question of great importance. Due to the type of business, it may be impossible to acquire jurisdiction over a shipowner to sustain a court action against him. However, the agreement to arbitrate in a particular jurisdiction has been held to constitute a consent to submit to the jurisdiction of the courts of that jurisdiction,[22] and that personal service of process is not essential to gain jurisdiction to enforce arbitration.[23] Again referring to rules of the various arbitration associations, the rules of these organizations generally provide for service of notices, etc., by mail, and this too is a great benefit to a party who wishes to arbitrate against a non-resident shipowner or cargo shipper or consignee who is unwilling to proceed as agreed.

Problem Where More Than One Person May Be Liable For the Loss

If more than one carrier and possibly an intervening warehouseman is involved in a particular shipment, the consignee may be unable to determine which one is liable for the loss or damage to his goods. Customarily, if suit was commenced, all possibly liable parties would be joined as defendants and the trier of fact would determine which was liable and to what extent. If one of those defendants were an ocean carrier whose bill of lading contained an arbitration clause, he would be justified in staying the suit as against him and insisting that his liability, if any, be determined by arbitration. This leaves the plaintiff in the unenviable position of having to try his case twice, once before the arbitrator as to the shipowner only, and once before the court as to all other defendants. Further, the possibility exists that the arbitrator may exonerate the shipowner on the ground that one or more of the other defendants was responsible for the loss, and the court exonerate the other defendants on the ground that the shipowner was responsible. This could not happen where all parties were before the same tribunal. This problem is implicit in the decision in

20. 9 U.S.C. 8.
21. Anaconda v. American Sugar Refining, 322 U.S. 42.
22. Mulcahy v. Whitehill, supra; Heyman v. Cole, 242 App. Div. 362; see 20 Corn. L.Q. 369.
23. Farr and Co. v. Cia International De Navegacion De Cuba, 243 F. 2d 342.

The Quarrington Court,[24] a limitation proceeding. Whether this problem is potentially serious enough to cause a shipper to refuse an arbitration clause in his bill of lading would be for the individual shipper to decide.

Recommendation

Since it is the marine underwriters, both cargo and ships, who lose by costly court litigation of relatively simple questions of liability and damages, they should enter into an agreement among themselves to arbitrate disputes arising out of cargo loss or damage. This could become a more or less industry-wide arrangement modelled after some aspects of Lloyds Marine Salvage arbitration procedure and some of the Air Transport Rules of Arbitration.

An example of an agreement among underwriters with conflicting interests, resolving many of their differences and referring any conflicts to arbitration, is the Agreement of Guiding Principles between Fire and Inland Marine underwriters. The agreement contains rules for determining which of two concurrent overlapping policies, one fire and one inland marine, shall be deemed primary in case of loss, and refers any disputes thereunder to arbitration.[25] This type of agreement has become quite common among underwriters with potential concurrent overlapping coverage, but apparently has not been used in marine cargo situations where, of course, the coverage generally is not overlapping. This agreement among underwriters would eliminate the necessity of incorporating an arbitration clause in the bill of lading. To enforce it, it would only be necessary to show that both the cargo and the ship underwriters are signatories to an agreement under which this controversy should be submitted to arbitration.

A Suggested Form of Agreement

The signatories to this agreement are underwriters engaged in insuring cargo against loss or damage during ocean transit and vessel P. and I. underwriters who may be ultimately liable for the same loss or damage.

Whereas, from time to time disputes arise in the apportionment of losses involving damage or loss to cargo during ocean transporta-

24. 25 F. Supp. 66.
25. Agreement of Guiding Principles, Fire-Inland Marine, Revised May, 1954, National Board of Fire Underwriters.

tion while insured under ocean marine cargo policies and at which time the ocean carrier is insured against liability for the same loss or damage under a vessel P. and I. policy, and

Whereas the occurrence of such disputes and their litigation in the courts is against the interests of the insuring companies and the general public, and

Whereas it is desirable that these disputes be settled amicably and at as little cost as possible,

Now therefore be it resolved that any such controversies involving two or more of the signatories to this agreement shall be settled by arbitration pursuant to the following rules:

1. Any party may demand arbitration by written notice to all others within one year of the date of discharge by the ocean carrier.

2. The notice of arbitration shall be in writing and be served by mail not more than 60 nor less than 30 days from the date specified for arbitration.

3. The arbitration shall be held either in the port of loading or in the port of discharge, at the discretion of the party demanding same, before three arbitrators, one chosen by each party and one by the two so designated. If they are unable to agree, the third arbitrator shall be appointed by a judge of any admiralty court having jurisdiction.

4. The arbitrators shall be chosen from a panel of admiralty attorneys who have been engaged in the practice of admiralty for a period in excess of five years and who have been designated by the signatories to this agreement as members of the panel. Each signatory is permitted to designate not more than 10 members of the panel.

5. The respondent, or respondents jointly, shall be required to post security for the full amount of the claim within 14 days of the demand for arbitration.

a. The amount of security shall be designated by the cargo underwriter claimant, but if in excess of the ultimate award, the cost of providing same shall be charged to the said claimant.

b. If the claimant feels insecure in its claim, notwithstanding the foregoing provision, it may commence the action by a libel in rem against the vessel.

c. If a hearing is not actually demanded by either the claimant or respondent within 3 months of the notice of

arbitration or such other period as may be agreed upon in writing between the parties, the amount of the security shall become the amount of the award, which award shall be as valid and enforceable as if it had been formally determined by an arbitration board.

6. The costs of the arbitration (schedule would be devised) shall be awarded against the respondent unless he or they have tendered an amount equal to or in excess of the award prior to entering upon the hearing.

7. The arbitrators shall accept and consider memoranda of the parties concerning the law and facts, if presented, and shall hear oral argument of counsel, if demanded, and shall render a written decision explaining the basis of the award, which award shall be published by mailing a copy to each party within thirty days of the termination of the hearing.

8. Any party shall have a right of appeal, by written notice to other parties within 30 days of the publishing of the award, to a single appellate arbitrator who shall be designated by monthly vote of the entire panel. The appeal shall be upon written and oral argument and without presentation of new evidence, and shall be final and binding, without further recourse, upon all parties.

9. The awards in previous arbitrations shall be considered as binding upon subsequent arbitrations of similar law and fact situations.

10. Any signatory of this agreement may intercede in any arbitration and present evidence or argument in an effort to influence the outcome regardless of absence of pecuniary interest in the results.

SOME ASPECTS OF SUBCONTRACTING IN LABOR-MANAGEMENT ARBITRATION

by Thomas A. Knowlton

Issues of "contracting out," or the subcontracting of bargaining unit work, occur frequently in arbitration. They were most recently discussed in some detail in the *Proceedings* of the National Academy of Arbitrators in 1960.[1]

There is, however, one type of case which is somewhat uncommon but which is interesting in itself and may throw some light on the general problem. Many thousands of sales-delivery jobs in the distributive industries are covered by Union contracts. Employees filling these jobs are generally known as driver-salesmen or route salesmen. They are usually the principal contact between the Employer and its store or retail customers. As such, they are a source of considerable company "good will." They work for a contractually determined salary and commission or straight commission. The routes are separate entities with geographical or customer boundaries and their individual values to the Employer are to some extent determinable. It may happen that a competitor of the Employer seeks to entice away one or more of the salesmen on the more valuable routes. It may be that the employer fears the encroachment of new competitors. In either event, the routes' value may drop considerably.

In this kind of situation, subcontracting can assume an unusual form. One means of forestalling a rather substantial loss to the employer lies in the sale of the affected routes, preferably to the existing driver-salesmen to whom obviously the routes are of greatest value.

In the event of a sale of a route to a third party who services it as a subcontractor, a contractual problem may arise with respect to the disposition of the affected employee. In the event of a sale to the driver-salesman himself, the problem involves only the union's

1. Donald A. Crawford, "The Arbitration of Disputes Over Subcontracting."

interest since it is to be assumed that the new relationship between the employer and the ex-employee is satisfactory to both and, indeed, is to be preferred by both to the former employer-employee relationship.

It is rather doubtful, in the absence of appropriate language in the collective agreement, that a union, through arbitration, can prevent the sale of the route either to a third party or to its driver-salesman member. The collective agreement *assumes* but does not *require* that the jobs included within its coverage are performed by employees. Only so long as the employment relationship lasts, therefore, is the agreement valid. The identity of the purchaser is not germane to the issue of the propriety of the sale unless one takes the somewhat awkward position that representation by a union creates a disability which extends beyond the severance of the employer-employee relationship.

If it were considered that the collective agreement covers the work, i.e., jobs, as set forth in the appropriate unit and that this work must continue to be performed by employees who are covered by the agreement, it would necessarily follow that the employer is precluded from disposing of its property, i.e., good will, without the consent of the union. In some cases, a large part of the employer's assets may be involved. A route may have a value of many thousands of dollars.

The question which is sometimes raised in subcontracting cases with respect to the extent of use of subcontractors, i.e., whether there is involved only a fraction of the total bargaining unit or a peripheral group of tasks, seems to me not necessarily to be determinative of the issue. If an employer with one hundred routes may sell one, may he not sell all, and vice versa?

Of course, a business decision of a distributor with a union contract to alter its means of distribution from employees driving company vehicles and subject to employer control to a method of individually negotiated contracts to perform the same function may very well seriously affect the existence of the union. Still, it is doubtful that the collective agreement would normally be interpreted as proscribing the sale, unless, of course, there is appropriate contractual language on the question.

If this argument is correct, it may be fruitful to draw some analogies. A collective agreement contains, as part of the unit, the work of, say, janitors or cafeteria employees. The employer determines

during the course of the agreement that the work performed by the janitors or the cafeteria employees can be done at less expense through the use of subcontractors. So far as I can determine, the essential difference between the decision of a distributor to sell a route and the decision of a manufacturing enterprise to subcontract its cafeteria lies entirely in the realm of business values. The cafeteria may be sold as a concession or, as in most cases, it may be necessary to provide a subsidy for its continuing operation. Whether the cafeteria has been profitable or not and whether the decision to contract out its operation is good or bad from a business point of view seems not to be within the normal contractual interest of the union.

Obviously, in the case of janitorial services, the business decision relates in good part to one of the relative costs of performing the function. It has sometimes been argued that, if the new method of performing the janitorial service involves the use of labor which is less costly than that required by the labor contract, it thereby becomes suspect. If, on the other hand, the subcontractor pays wage rates which are above the contractual scale and manages the services so efficiently as to enable it to perform the operation at a profit, less suspicion is attached to the employer's divestment of responsibility. I cannot believe that a usual silent collective bargaining agreement is subject to such a variety of interpretations.

There is another facet to this question. It is not impossible that the cafeteria employees, like the driver-salesmen, are enterpreneurally inclined. They may themselves decide that they prefer to provide food for the plant workers and to assume responsibility for this function as subcontractors. Such a change in status would, of course, have a rather high emotional content but might well be contractually proper.

The use of examples of the cafeteria or janitorial service is not intended here to be in any way restrictive on the rationale of the discussion. What would apply to them would, it seems to me, apply also to tool room or punch press operations.

In the final result, it is difficult to escape the conclusion that collective bargaining agreements which are silent on the question of subcontracting depend for their continued validity on the *business* decisions of the employer, concerning which the union has little knowledge and less influence.

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AN EDITORIAL

(*Continued from Page 50*)

It is precisely for this reason that greater care ought to be exercised in composing arbitration clauses that give parties flexibility and freedom of action. This can be accomplished through direct reference to AAA rules, for those rules provide adequate notice, in accordance with law, for each critical step that must be taken before arbitration can be initiated and continued to a conclusion. And most important, those rules provide remedies for lapses or failures by a party to perform conditions precedent to arbitration. We urge use of the Association's standard clause not in any sectarian sense. It has been found to be both effective and fair for parties in industry and commerce generally. Effective arbitration also takes place under trade association rules, and through the good offices of attorneys and arbitrators named in contracts of parties. Whatever agency parties resort to and whatever the rules they rely upon, it is best to exercise sufficient foresight when composing their arbitration clauses so that arbitration will truly be a quick and economical means of resolving disputes, not just another link in an endless chain of litigation.

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *The Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

A CONTRACT TO ARBITRATE CONTROVERSIES NEED NOT BE SIGNED, provided there is a memorandum in writing to sustain it and the contracts have been retained. The court cited the leading case of *Helen Whiting, Inc. v. Trojan Textile Corp.,* 307 N.Y. 360. *Gala Sportswear Co. v. Cohn-Hall Marx Co.,* N.Y.L.J., May 24, 1961, p. 15 col. 4 (Greenberg, J.).

ARBITRATION STAYED FOR LACK OF MUTUALITY IN THE AGREEMENT. Where the arbitration clause read: "Any controversy relating to the contract shall at the option of the seller, be settled by arbitration, or by Reference to the Court," the court held: "Since the agreement to arbitrate, like every other binding contract necessarily must possess the element of mutuality, and since the agreement is lacking in this element, the arbitration must be stayed." *Calvine Mills, Inc. v. Goldfarb Bros.,* N.Y.L.J., March 14, 1961, p. 13 col. 3 (Levey, J.).

SUCCESSORS IN INTEREST ARE BOUND BY ARBITRATION AGREEMENT. A trustee in reorganization who seeks to recover on a contract made with his debtor prior to the beginning of the reorganization proceeding may be compelled to proceed to arbitration in accordance with a provision in the contract. *Schilling v. Canadian Foreign Steamship Co.,* 190 F.Supp. 462 (S.D. N.Y., Dimock, D.J.).

WHETHER CONDITIONS PRECEDENT TO ACCEPTANCE OF CONTRACT CONTAINING ARBITRATION CLAUSE WERE MET HELD MATTER FOR COURT TO DETERMINE UNDER FEDERAL ARBITRATION ACT. Concurring in the viewpoint of *Robert Lawrence Co. v. Devonshire Fabrics, Inc.* (271 F.2d 402, cert. gr. 362 U. S. 909, dismissed pursuant to Rule 60, 1960, 364 U. S. 801), the Second Circuit agreed that "the validity and interpretation of an arbitration agreement must be determined by the federal substantive law of arbitration as expressed in the Arbitration Act." The District Court, relying on *Robert Lawrence Co.* (supra, digested in *Arb. J.,* 1960, p. 151), declared that the arbitration clause was separable from the rest of the contract and therefore was a binding agreement to arbitrate all differences including the performance of any threshold conditions. On appeal the Circuit Court said: "We are of the opinion that this conclusion that the arbitration clause was separate from the rest of the contract was erroneous." In *Robert Lawrence* the aim "was

to destroy frustration of the Arbitration Act by a litigant's cry of fraud in the inducement, a claim that would require a preliminary court adjudication in every case where the cry was raised . . . This is not the situation before us in the present case. Aminoil made it clear that the enjoyment by a bidder for the contract of the contractual fruits and duties was conditioned on the bidder's prior performance of the prior acts required of that successful bidder . . . Every clause including the arbitration clause was expressly so conditioned. This poses quite a different problem from the problem posed by a cry of fraud in the inducement. Here there is no likelihood of sham litigation to avoid submitting issues to arbitration." *El Hoss Engineering & Transport Co. v. American Independent Oil Co.*, 289 F.2d 346 (2d Cir. Waterman, C. J.).

ARBITRATION CLAUSE IN CONTRACT DOES NOT FALL BECAUSE OF TERMINATION OF THE MAIN CONTRACT IN WHICH IT IS CONTAINED. The Court referred to *Terminal Auxiliar Maritima v. Winkler*, 6 N.Y. 2d 294, 189 N.Y.S. 2d 655, where it was said: "It is settled that under a broad provision for arbitration, such as we have here, arbitration may be had as to all issues arising subsequent to the making of the contract . . . The so-called 'termination' or 'cancellation', relied upon by Winkler to defeat the arbitral process, was nothing more or less than a 'termination' of a contract for an alleged breach or non-performance of its terms. That does not put an end to the right to arbitrate claims accruing prior thereto, for, if it did, an arbitration clause could rarely, if ever, be carried out." *Mancini v. Stern*, 210 N.Y.S. 2d 329 (Conroy, J.).

WHETHER CONTRACT IS LACKING IN MUTUALITY SO THAT NEITHER PARTY COULD BE BOUND IS AN ISSUE FOR THE ARBITRATORS AND NOT THE COURT. Referring to its recent decision in *Exercycle Corp. v. Maratta*, 9. N.Y. 2d 329 (digested on p. 99), the Court said: "We pointed out in the *Exercycle* opinion that the resolution of such a dispute depended primarily on a construction of the agreement and that, when there were permissible differences of interpretation, the issue was for the arbitrators and not for the court." *De Laurentiis v. Cinematografica de las Americas*, S.A., 9 N.Y. 2d 503 (Desmond, Ch. J.).

WHEN A STAY OF ARBITRATION IS SOUGHT THE EXISTENCE OF A VALID AGREEMENT CONTAINING AN ARBITRATION CLAUSE IS A MATTER FOR THE COURT TO DECIDE AND NOT THE ARBITRATOR. "There is no doubt that in this case the dispute sought to be arbitrated is referable to arbitration. Presented, however, is a serious question as to the *validity* of the agreement containing the arbitration clause . . . Accordingly, the only substantial issue of fact presented here is whether the agreement was altered, as claimed by Mike's. That issue cannot be determined on affidavits but after a plenary hearing. The motion for a stay of arbitration is, accordingly, granted until that issue has been determined in accordance with subdivision 2 of section 1458 of the Civil Practice Act." *Mike's Merry Go Round Rest., Inc. v. Lincoln Service, Inc.*, 211 N.Y.S. 2d 345 (Tessler, J.).

CORPORATION ALLEGED TO BE SUCCESSOR OF DISSOLVED CORPORATION WAS NOT BOUND BY ARBITRATION AGREEMENT BETWEEN UNION AND DISSOLVED CORPORATION. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. *Livingston* (*as Pres., Dist. 65, R.W.D.S.U., AFL-CIO*) *v. Gindoff Textile Corp.*, 191 F. Supp. 135 (S.D. N.Y., McGohey, D.J.).

UPON MERGER OF ARBITRATION AGENCIES, THE RULES OF THE LAWFUL SUCCESSOR APPLY TO CONTRACTS CALLING FOR ARBITRATION ACCORDING TO THE RULES OF THE MERGED AGENCY. "The fact that the named arbitration group is no longer active having merged with General Arbitration Council of the Textile Industry will not defeat the arbitration which was the clear intent of the parties." *Benjamin Bernstein Sons, Inc. v. Empire State Mills, Inc.*, N.Y.L.J., May 11, 1961, p. 13 col. 6 (Greenberg, J.).

SUCCESSOR CORPORATION THAT IS MERELY THE "ALTER EGO" OF A PARTNERSHIP IS BOUND BY ARBITRATION CLAUSE OF COLLECTIVE BARGAINING AGREEMENT MADE BY THE PARTNERSHIP. In reversing the Appellate Division opinion in 10 App. Div.2d 937 (digested in *Arb. J.* 1960, p. 146), the court denied a motion to stay arbitration, saying that "where the same men are doing business in the new guise of the corporation, and there are no stockholders who did not participate in the earlier enterprise, the corporation will be held liable for its predecessor's debts and contract obligations." *Reif* (*as Pres. of Local* 169, *Amal. Clothing Workers of America*) *v. Williams Sportswear, Inc.*, 9 N.Y. 2d 387, 214 N.Y.S. 2d 395 (Dye, J.).

II. THE ARBITRABLE ISSUE

DISPUTES CONCERNING SEVERANCE PAY AND PENSION RIGHTS CAUSED BY MOVEMENT OF PLANT HELD ARBITRABLE under collective bargaining agreement calling for arbitration of differences between employer and union as to meaning and application of provisions of the agreement, even though the agreement also provided for no arbitration of broad labor policies, and provided that the only pension problems subject to arbitration would be ones involving eligibility. *United Saw, File & Steel Products Workers of America, Federal Labor Union No. 22254, AFL-CIO v. H. K. Porter Co.*, 190 F.Supp. 407 (E.D. Pa., Lord, D. J.).

WHETHER GENERAL RELEASE TERMINATED ARBRITATION AGREEMENT IS A QUESTION TO BE RESOLVED BY ARBITRATORS. *Bronston v. Glassman*, 13 App. Div.2d 486, 212 N.Y.S. 2d 239 (First Dep't.) (appeal pending).

A CONTROVERSY WHICH ARISES OUT OF AN AGREEMENT PURPORTING TO DISSOLVE A PARTNERSHIP IS ARBITRABLE under terms of partnership agreement providing for arbitration of disputes concerning its termination. *Mason v. Spitzer*, 26 Misc.2d 812 (Pittoni, J.).

SUIT BY AN EMPLOYER TO RECOVER DAMAGES FOR VIOLATION OF A NO-STRIKE CLAUSE IS NOT SUBJECT TO ARBITRATION under a collective bargaining agreement calling for arbitration of "differences . . . as to the meaning or application of the provisions of this Agreement." The court relied on *U.A.W. v. Benton Harbor Meallable Industries,* 242 F.2d 536 (6th Cir., 1957), where it was said at p. 541: "In the commonly accepted meaning of the term 'grievance,' violation of a no-strike provision in a collective bargaining agreement does not constitute a grievance." *Vulcan-Cincinnati, Inc. v. United Steelworkers of America,* 289 F.2d 103 (6th Cir., O'Sullivan, C. J.).

A QUESTION OF ARBITRABILITY, ONCE HAVING BEEN DETERMINED, BECOMES RES JUDICATA. The Appellate Division affirmed a denial of a stay of an action pending arbitration and extended the petitioner's time to answer the complaint (*Weiss v. Zucker,* 12 App. Div.2d 803; leave to appeal to the Court of Appeals denied, 12 App Div.2d 972). Petitioner then filed an answer in the action and additionally served a demand for arbitration on his adversary. The court stayed the arbitration on the grounds that the issue of arbitrability having once been litigated, the determination was binding on both parties. *Zucker v. Weiss,* N.Y.L.J., May 9, 1961, p. 16 col. 1 (Cone, J.).

DISCHARGE FOR PICKETING HELD AN ARBITRABLE GRIEVANCE. Where an employee, peaceably employed at one of the employer's plants, was picketing, after working hours, at another plant represented by one local union, he was not in a strike in violation of a collective bargaining agreement between the employer and another local and the same parent union, covering a plant not being struck. Therefore the discharge for picketing was arbitrable under the agreement. *Lodge* 700, *International Association of Machinists v. United Aircraft Corp.,* 193 F.Supp. 69 (D. Conn., Anderson, Ch. J.).

COURT REFUSES TO STAY ARBITRATION OF DISPUTES ARISING UNDER EMPLOYMENT CONTRACT WHICH PROVIDED THAT EMPLOYEE WAS TO WORK FOR LIFE UNTIL HE LEFT VOLUNTARILY OR DIED. The employer argued the agreement was void for want of mutuality and that the employee had resigned and therefore the agreement was no longer in existence. The Court held this was a proper matter for the arbitrators to determine and denied a motion to stay arbitration, affirming 11 App. Div.2d 677 (digested in *Arb. J.* 1960, p. 146). *Exercycle Corp. v. Maratta,* 9 N.Y. 2d 329, 214 N.Y.S. 2d 353 (Fuld, J.).

COURT DIRECTS ARBITRATION OF GRIEVANCE, ALLEGING EMPLOYER FILLED JOB OPENING WITH AN EMPLOYEE OUTSIDE THE BARGAINING UNIT, notwithstanding contract provisions giving the employer discretion and authority in filling job openings. The Federal District Court, W. D. Wisconsin, concluded that the claim was not arbitrable because the contract made the selection of an employee to fill a job vacancy a matter for the company's sole judgment and discretion, which could not be challenged or questioned under the provisions of the contract. The

Seventh Circuit Court reversed, saying: "The congressional policy found in the Labor Management Relations Act favoring the use of arbitration as a means to the achievement of industrial peace requires that arbitration clauses in labor agreements be given the most liberal construction which is compatible with the intent of the parties as therein expressed." *Nepco Unit of Local* 95, *Office Employees Int'l Union, AFL-CIO v. Nekoosa-Edwards Paper Co.*, 287 F.2d 452 (Mercer, D. J.).

DISPUTE OVER ALIEGED BREACH OF STOCKHOLDERS' AGREEMENT IN CLOSED CORPORATION HELD ARBITRABLE DESPITE CONTENTION THAT A "DERIVATIVE SUIT" IS INVOLVED. The petitioner alleged that the defendants caused the close corporation to pay them salaries in excess of the amounts agreed to be paid under the terms of the agreement. Against the argument that only redress on behalf of the corporation was being sought for breach of fiduciary duty and that such derivative suits are not arbitrable, the court said it disagreed. "The complaint, despite its derivative suit plumage, alleges nothing more than a charge by one of the signatories of a contract that those he contracted with breached its terms. . . . The arbitration provision here involved [interpretation, breach, cancellation, performance or non-performance] is broad in its terms and unambiguous in its meaning. As such the dispute here involved is a proper one within its coverage." *Crandall v. Master-Eagle Photo Corp.*, 27 Misc.2d 475, 211 N.Y.S. 2d 535 (Markowitz, J.).

DISPUTES OVER ALLEGED DELAYS AND EXTRA WORK HELD ARBITRABLE UNDER BROAD ARBITRATION CLAUSE RELATING TO "PERFORMANCE, NON-PERFORMANCE, DEFAULT, COMPLIANCE OR NON-COMPLIANCE.". The court, affirming the decision of the district court (digested in *Arb. J.* 1960, p. 101) held that federal policy is to construe arbitration clauses liberally to find they cover disputes reasonably contemplated by parties and to resolve doubts in favor of arbitration. *Metro Industrial Painting Corp. v. Terminal Const. Co.*, 287 F.2d 382 (2d Cir., Moore, C. J.).

THE COURT, NOT THE ARBITRATOR, SHOULD DETERMINE WHETHER UNION VIOLATED NO-STRIKE PROVISION OF COLLECTIVE BARGAINING AGREEMENT. "Where the no-strike clause is as specific as in the case at bar, it seems clear that the parties intended the grievance-arbitration procedure to supplant strikes as a means of resolving industrial disputes, but did not intend to subject alleged breaches of the no-strike clause to arbitration when a strike was resorted to before making any attempt to utilize the grievance-arbitration procedure." *Drake Bakeries, Inc. v. Local* 50, *American Bakery & Confectionery Workers International, AFL-CIO*, 287 F.2d 155 (Swan, C.J.).

OBLIGATION TO ARBITRATE GRIEVANCES IS NOT LIMITED TO THOSE WHICH MIGHT ARISE DURING THE LIFE OF THE COLLECTIVE BARGAINING AGREEMENT. "In agreeing to arbitrate such grievances the parties did not differentiate between grievances arising during or after the termination of said agreement . . . In the absence of such limita-

tion its obligation must be deemed to include the arbitration of claims for vacation pay which were first asserted and rejected after the termination of said collective bargaining agreement." *General Tire & Rubber Co. v. Local No.* 512, *United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO,* 191 F.Supp. 911 (D. Rhode Island, Day, D. J.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

A MOTION TO STAY AN ACTION PENDING ARBITRATION CANNOT BE MAINTAINED BY ONE NOT A PARTY TO AN ARBITRATION AGREEMENT. Where a prime contract provided for arbitration and there was no arbitration proceeding pending between the subcontractor and the prime contractor, a surety was not entitled to stay of subcontractor's action. *Major Concrete Co. v. Massachusetts Bonding and Insurance Co.,* 27 Misc.2d 113, 210 N.Y.S. 2d 696 (Livoti, J.).

WHETHER STATUTE OF LIMITATIONS BARS ARBITRATION OF UNINSURED MOTORIST CLAIM, HELD A MATTER FOR THE ARBITRATOR TO DETERMINE. Petitioner sought to stay arbitration commenced under the uninsured motorist provisions of its insurance policy on the grounds that the underlying claim against the owner and operator of the uninsured vehicle to which it had a right of subrogation was now barred by the statute of limitations, the argument being that respondent's claim against it should therefore also be barred and hence the arbitration stayed. The court said: "It is apparent that serious questions are raised concerning the interpretation of this contract. Since the dispute is a genuine one, these questions are properly for the arbitrator." *Home Insurance Co. v. Schulman,* N.Y.L.J., May 1, 1961, p. 16 col. 3 (Nathan, J.) .

PENNSYLVANIA ARBITRATION ACT OF 1927 APPLIES TO ARBITRATIONS UNDER COLLECTIVE BARGAINING AGREEMENTS. Thus, the union has a right to appeal to a state court for the purpose of modifying an arbitration award. *Local* 2131, *United Bro. of Carpenters & Joiners of America v. Aetna Steel Products Corp.,* 36 LA 717 (Pa. Ct. of Common Pleas, Skuykill County, Curran, P. J.).

WHETHER CORPORATION ALLEGED TO BE SUCCESSOR OF DISSOLVED CORPORATION IS BOUND BY ARBITRATION AGREEMENT BETWEEN UNION AND DISSOLVED CORPORATION IS A MATTER FOR COURT DETERMINATION. Petitioner argued that the arbitrator should decide whether the new corporation is the "successor" of the original signatory to the contract. The court denied this contention, stating: "If petitioner's position were upheld, it would do violence to the judicial process by forcing a stranger to an agreement to submit to arbitration a justiciable issue as to whether he is bound by the agreement. As succinctly stated by Mr. Justice Douglas in the *Steelworkers* case: 'Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute to which he has not agreed so to submit.' " *Office Employes International Union, Local* 153, *AFL-CIO v. Ward-Garcia Corp.,* 190 F.Supp. 448 (S.D. N.Y., Weinfeld, D. J.).

WHERE DEMAND FOR ARBITRATION RAISES ISSUES WHICH ARE ARBITRABLE UNDER THE AGREEMENT, A MOTION TO STAY ARBITRATION SHOULD PROPERLY BE DENIED. *Mayfair Super Markets, Inc. v. Tantleff,* 13 App. Div.2d 488, 212 N.Y.S. 2d 570 (First Dep't.).

APPLICATION TO COMPEL ARBITRATION MAY BE BARRED BY STATUTE OF LIMITATIONS, IN VIEW OF THE NEWLY ENACTED PROVISION OF SEC. 1458-a, N.Y. C.P.A. *New York Central Railroad Co. v. Erie Railroad Co.,* 213 N.Y.S. 2d 15 (Matthew M. Levy, J.).

FOREIGN CORPORATION MAY COMMENCE ARBITRATION IN NEW YORK STATE WITHOUT HAVING FILED CERTIFICATE FOR DOING BUSINESS. Though Sec. 218, General Corporation Law provides that a foreign corporation doing business in this state cannot maintain an action upon any contract made by it in this state unless it has filed a certificate for doing business, arbitration is a special proceeding and not an action. *General Knitting Mills, Inc. v. Rudd Plastic Fabrics Corp.,* 212 N.Y.S. 2d 783 (DiGiovanna, J.).

WHEN SUIT IS BROUGHT AGAINST A PARTY TO AN ARBITRATION AGREEMENT, THE REMEDY OF THE AGGRIEVED PARTY IS TO APPLY FOR A STAY OF THE ACTION PURSUANT TO THE ARBITRATION STATUTE. "Aside from the fact that the arbitration agreement among the stockholders does not appear to embrace the issues presented in this derivative stockholder's action, it may not be pleaded in the first defense, since defendants' exclusive remedy was to apply for a stay of the action pursuant to Section 1451, Civil Practice Act." *Aschkenasy v. Teichman,* 210 N.Y.S. 2d 593 (First Dep't.).

ONLY "PARTIES AGGRIEVED" BY FAILURE OF ANOTHER TO ARBITRATE ARE ENTITLED TO MAINTAIN A PROCEEDING TO COMPEL ARBITRATION. Arbitration agreements in charter parties, in the event of failure of the other party to appoint an arbitrator, provided their own remedies; petitioners could therefore proceed without any action of court in order to make arbitration agreements effective. Parties who failed to follow the method for appointment of the second arbitrator provided in the agreements, were not "parties aggrieved" by a failure to arbitrate within the meaning of the Federal Arbitration Act and were therefore not entitled to maintain a proceeding to compel arbitration. *A/S Ganger Rolf v. Zeeland Transportation, Ltd.,* 191 F.Supp. 359 (S.D. N.Y., van Pelt Bryan, D. J.).

DOCTRINE OF RES JUDICATA DOES NOT APPLY TO STATE COURT REFUSAL TO COMPEL EMPLOYER TO ARBITRATE SENIORITY RIGHTS IN SUBSEQUENT ACTION BY FORMER EMPLOYEES AGAINST EMPLOYER FOR DAMAGES. The decision was based on the fact that the state court merely decided that the arbitration provision in the collective bargaining agreement did not confer jurisdiction to adjudicate seniority disputes. *Zdanok v. Glidden Company,* 288 F.2d 99 (2d Cir., Madden, J.).

COMMENCEMENT OF DECLARATORY JUDGMENT ACTION IS A WAIVER OF RIGHT TO ARBITRATION. The Appellate Division, reversing the ruling in 26 Misc.2d 513, held that an insured who brings an action to determine that an automobile which injured him was an "uninsured automobile" within the terms of his own insurance policy waives any right to have arbitration of this issue, even though the action was dismissed without prejudice. *Travelers Indemnity Co. v. Sherwood,* 13 App. Div.2d 507, 212 N.Y.S. 2d 427 (Second Dep't.).

PENDENCY OF AN ARBITRATION PROCEEDING IS NOT A GROUND FOR STAY OF ACTION BY ONE NOT A PARTY TO THE ARBITRATION AGREEMENT. A bank filed a motion for a stay of an action until the rendering of an award in an arbitration proceeding in progress in London. The court held the bank's position that the pendency of the arbitration proceeding in London barring payment under a letter of credit to the plaintiff was not a ground for a stay of the action. The proper method was to interpose a defense to an action for payment. The court did not pass on whether the pendency of the arbitration proceeding was in fact a good defense to the action. *Vector Steamship Company, S. A., Panama v. Mitsubishi Bank Limited,* N.Y.L.J., Oct. 27, 1960, p. 13 col. 4 (Sup. Ct. N.Y.), aff'd 12 App. Div. 2d 910, 210 N.Y.S. 2d 625 (First Dep't.).

SEC. 1451 N.Y. C.P.A. AUTHORIZES STAY OF PROCEEDINGS BROUGHT IN VIOLATION OF AN ARBITRATION CONTRACT, WHERE SUCH PROCEEDINGS ARE PENDING, OUTSIDE OF NEW YORK STATE, BEFORE AN ADMINISTRATIVE AGENCY OF THE FEDERAL GOVERNMENT. An arbitration clause was included in a contract for the purchase of horseradish roots. The buyer, claiming the articles were not of the grade specified and therefore unfit for resale, commenced proceedings before the Department of Agriculture to enforce rights provided for in the Federal Perishable Agricultural Commodities Act. The court, in reversing 11 App. Div.2d 656 (digested in *Arb. J.* 1961, p. 46), held the seller was entitled to an order staying these proceedings. *S. M. Wolff Co. v. Tulkoff,* 9 N.Y. 2d 356, 214 N.Y.S. 2d 374 (Fuld, J.).

INDIVIDUAL EMPLOYEE IS NOT ENTITLED TO COMMENCE ACTION TO RECOVER WAGES WHERE THE COLLECTIVE BARGAINING AGREEMENT PROVIDES FOR ARBITRATION OF ALL DISPUTES. A motion to stay the action pending arbitration was granted, because the former employee was not entitled to recover in view of remedies available to him under the collective bargaining agreement. *Kohl v Appleby,* 212 N.Y.S. 2d 185 (Amsterdam, J.).

INDEPENDENT BASIS OF FEDERAL JURISDICTION MUST EXIST IN ORDER FOR FEDERAL COURT TO COMPEL ARBITRATION. Diversity of citizenship alone is not enough to empower a federal court to compel arbitration under sec. 4 of the Federal Arbitration Act. In addition, "the contract in which the arbitration clause is included must be one 'evidencing a transaction involving commerce' within the meaning of Sections 1 and 2 of the Act." *Metro Industrial Painting Corp. v. Terminal Const. Co.,* 287 F.2d 382 (2d Cir., Moore, C. J.).

FEDERAL COURT REFUSES TO COMPEL ARBITRATION OF DISPUTES RELATING TO AMENDMENTS TO COLLECTIVE BARGAINING AGREEMENT. Neither the Labor Management Relations Act nor the United States Arbitration Act authorizes federal courts to enforce specifically agreements which call for "quasi-legislative" arbitration which is involved when one party is seeking arbitration over disputes affecting amendments to the collective agreement. *Couch (IBEW, AFL-CIO) v. Prescolite Mfg. Corp.*, 191 F. Supp. 737 (W.D. Arkansas, Henley, D. J.).

EMPLOYER MAY NOT COMPEL ARBITRATION AGAINST THE UNION WHERE ONLY INDIVIDUAL EMPLOYEE GRIEVANCES ARE INVOLVED. Said the federal court: " . . It is far from clear that the company has the right to compel the union to arbitrate grievances, not of the company, but of employees. Such a procedure is patently so contrary to experience and common sense that in order for a contract to be so interpreted there would have to be the most lucid kind of language. Were the company seeking arbitration of *its* complaints and grievances, the complexion . . . would be very different." *Crescent Brass & Pin Co. v. United Automobile Workers*, 36 LA 643 (E.D. Mich., Thornton, D. J.).

COURT GRANTS INJUNCTION TO RESTRAIN UNION FROM CALLING A WORK STOPPAGE AND STRIKE. "The strike and stoppage threatened by the defendants, and apparently in progress at this time, unless the plaintiffs capitulate to their demands without resort to determination of those disputes in the manner provided in the agreement, does not lend itself to the status of a bona fide labor dispute and may be enjoined without regard to the provisions of sec. 876(a) of the Civil Practice Act." *Bickler v. Ottley*, N.Y.L.J., May 25, 1961, p. 18 col. 8 (Cone, J.).

COURT WILL NOT COMPEL ARBITRATION WHERE UNION FAILED TO COMPLY WITH TIME LIMITS PRESCRIBED IN COLLECTIVE BARGAINING AGREEMENT. The union failed to give timely written notice of appeal from a step of the grievance procedure where the company had agreed "to further process the grievance *only* if timely demand therefor in writing was made. None having been made, there is no obligation to process further or to arbitrate and nothing to arbitrate." *United Brick & Clay Workers of America, AFL-CIO v. Gladding, McBean & Co.*, 192 F.Supp. 64 (S.D. Cal. Yankwich, D. J.).

COURTS WILL GRANT SPECIFIC PERFORMANCE OF CONTRACT TO ARBITRATE when it determines that the reluctant party agreed to arbitrate. "Doubts should be resolved in favor of coverage." *General Tire & Rubber Co. v. Local 512, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO*, 191 F.Supp. 911 (D. Rhode Island, Day, D. J.).

INDIVIDUAL EMPLOYEE HAS NO CAUSE OF ACTION AGAINST RAILROAD EMPLOYER FOR DISCHARGING HIM AFTER A HEARING PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT, FROM WHICH HE DID NOT APPEAL. *Panzarella v. N.Y. Central System, Inc.*, 27 Misc.2d 57 (Sup. Ct. Erie Co., N.Y., O'Brien, J.).

WHERE A COMPLAINT ALLEGES A BREACH OF A COLLECTIVE BARGAINING AGREEMENT, THE CASE IS REMOVABLE TO FEDERAL COURT. *Couch (IBEW, AFL-CIO) v. Prescolite Mfg. Corp.*, 191 F.Supp. 737 (W.D. Arkansas, Henley, D. J.).

INDIVIDUAL EMPLOYEES WERE PERMITTED TO SUE EMPLOYER FOR DAMAGES FOR BREACH OF SENIORITY PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT EVEN THOUGH AGREEMENT CONTAINED PROVISIONS FOR ARBITRATION OF DISPUTES. In reversing the decision of the District Court, 185 F.Supp. 441 (digested in *Arb. J.* 1961 p. 42), the Court said: "Rights embodied in a collective bargaining contract negotiated by a union 'inure to the direct benefit of employees and may be the subject of a cause of action.' " Judge Lumbard dissented "for the reasons persuasively set forth" in the District Court's opinion. *Zdanok v. Glidden Company*, 288 F.2d 99 (2d Cir., Madden, J.).

COURT REFUSES TO STAY ARBITRATION BECAUSE OF LACHES IN MAKING DEMAND. The Union agreed to attempt to settle disputes promptly, though the collective bargaining agreement contained no specific time limit within which to demand arbitration nor did it contain any forfeiture provisions for failure to act promptly. The court held laches was not a vald defense either before the court or before the arbitrators. *Gilmore (American Federation of Television & Radio Artists) v. Marietta Broadcasting, Inc.*, 193 F.Supp. 366 (S. D. Cal., Weinberger, D. J.).

IV. THE ARBITRATOR

WHETHER RESIGNATION OF PARTY-APPOINTED ARBITRATOR TERMINATED ARBITRATION HELD MATTER FOR THE COURT TO DETERMINE. In an arbitration which was to be held in accordance with the "laws of the Jewish Orthodox faith" the court felt it necessary to have a hearing before experts in that field of law in order to determine whether the resignation of the plaintiff's arbitrator terminated the arbitration proceeding. *Katz v. Beth Jacob of Bensonhurst*, N.Y.L.J., March 15, 1961, p. 16 col. 4 (DiGiovanna, J.).

ARBITRATORS CANNOT BE REMOVED PENDING THE ARBITRATION HEARINGS. The proper relief would be to seek to vacate the award after the conclusion of the arbitration proceedings. "At the present juncture . . . the court is without power to grant the requested relief." *Wales Fabrics, Inc. v. Botany Finishing Co.*, N.Y.L.J., March 15, 1961, p. 13 col. 5 (Aurelio, J.) .

FAILURE TO INSERT THE NAME OF AN ARBITRATOR IN THE CONTRACT IS NO BAR OR IMPEDIMENT TO ARBITRATION, "as the parties provided for a submission to the New York State Board of Mediation for the appointment of such impartial chairman in the event of a vacancy." *Bickler v. Ottley*, N.Y.L.J., May 25, 1961, p. 18 col. 8 (Cone, J.).

ARBITRATOR MUST ADJOURN HEARINGS WHEN SERVED WITH A NOTICE OF MOTION TO STAY THE ARBITRATION. Sec. 1458(2) N.Y. C.P.A. provides for adjournment of arbitration hearings "upon service of such notice of motion pending the determination of the motion," referring to a motion for a stay. Said the court: "The statute is express in its command, and the arbitrator could not exercise his discretion contrary to the statute." *Dalcro Corp. v. Wilkinson (as Pres., Snow Suit, Skiwear, etc. Union Local 105, I.L.G.W.U., AFL-CIO)*, 213 N.Y.S. 2d 661 (Hopkins, J.).

WHENEVER AGREEMENT TO ARBITRATE CONTAINS TIME LIMIT WITHIN WHICH AWARD MUST BE RENDERED, THE AUTHORITY OF THE ARBITRATOR TERMINATES WITH THE EXPIRATION OF THAT TIME AND SUCH A PROVISION IS MANDATORY. *Librascope Incorporated v. Precision Lodge No. 1600, Int'l Association of Machinists, AFL-CIO,* 10 Cal. Rptr. 795 (Dist. Ct. of Appeal, Second Dist., Calif., Vallee, J.).

AN ARBITRATOR IS IMMUNE FROM ACTIONS BROUGHT BY EITHER OF THE PARTIES ARISING OUT OF HIS PERFORMANCE AS AN ARBITRATOR. However, an architect may in the construction of a building assume many roles as a planner, designer, supervisor or owner's agent as well as an arbitrator. It is only when he acts in the role of an arbitrator that he receives the cloak of immunity; there is no immunity granted to the architect when he is performing one of his other services as an architect. *Craviolini v. Scholer & Fuller Associated Architects,* 357 P.2d 611 (Sup. Ct. Arizona, Phelps, J.).

DELAY OF ONE DAY IN APPOINTING ARBITRATOR IS NOT SUFFICIENT TO DEPRIVE PARTY OF THAT RIGHT. "Where a delay of one day in the appointment of an arbitrator has occurred in the case of parties who are in continual communication, such a delay is an immaterial variation of the terms of the contract and should not be permitted to upset the basic and original intent of the arbitration plan." *Lobo & Co. v. Plymouth Navigation Co. of Monrovia,* 187 F. Supp. 859 (S.D.N.Y. 1960).

V. THE PROCEEDINGS

PARTICIPATION IN ARBITRATION PROCEEDINGS IS A WAIVER OF THE RIGHT TO OBJECT TO THE EXISTENCE OF ARBITRATION AGREEMENT. The proper procedure was to move to vacate the notice of arbitration. Once having litigated the issue in the arbitration proceedings, the arbitrator's finding is conclusive. *Classic Togs, Inc. v. Joint Board, etc. Local 23, I.L.G.W.U.,* 211 N.Y.S. 2d 653 (Steuer, J.).

COMMENCEMENT OF A LAWSUIT BY A PARTY TO ARBITRATION AGREEMENT AMOUNTS TO A WAIVER AND ABANDONMENT OF THE RIGHT TO ARBITRATE. "Unless compelled to do so, he cannot later change his mind and compel arbitration once he has waived it by bringing the action." *Sussman v. Goldberg,* 210 N.Y.S. 2d 912 (Tessler, J.).

WHETHER A PARTY AGREED TO ARBITRATION AND WHETHER THE DEMAND FOR ARBITRATION WAS TIMELY MADE ARE MATTERS FOR COURT DETERMINATION. The Supreme Court, Nassau County, denied a motion to stay arbitration of construction disputes arising under contract forms issued by the American Institute of Architects. The Appellate Division reversed, pending the determination by the court, pursuant to sections 1450 and 1458 C.P.A., of the issues: (1) whether petitioner agreed to arbitration; and (2) whether the demand for arbitration was timely made. *Greater New York Terminal, Inc. v. Horn Construction Co.*, 12 App. Div.2d 820, 210 N.Y.S. 2d 316 (Second Dep't.).

SERVICE OF NOTICE ON ATTORNEY HELD SUFFICIENT TO BIND PARTY TO ARBITRATION where the notice was served by registered mail on the attorney who had represented the party in all preliminary proceedings. Where the contract called for arbitration to be "governed by the same rules of procedure as if it were conducted by and under the rules of the American Arbitration Association," rule 39 which permits the party to be served "by mail addressed to such party *or his attorney* at his last known address . . ." applies in spite of another section of the rules which calls for service of a notice by a tribunal clerk. Said the court: "While both sections seemingly are contradictory, the court is of the opinion that section 39 applies where the association, itself, is not conducting the arbitration but only its rules are being utilized." *Sandowski v. Wetzler*, N.Y.L.J., June 1, 1961, p. 19 col. 1 (Latham, J.).

A CLAIMANT SEEKING ARBITRATION AGAINST MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION BASED ON A DISCLAIMER OF LIABILITY IS NOT REQUIRED TO OBTAIN A DECLARATORY JUDGMENT AS TO VALIDITY OF THE DISCLAIMER. *Motor Vehicle Accident Indemnification Corp. v. Caruso, Motor Vehicle Accident Indemnification Corp. v. Morrison*, 214 N.Y.S. 2d 600 (Gulotta, J.).

ARBITRATION MAY BE WAIVED BY FAILURE TO DEMAND ARBITRATION WITHIN TIME LIMITS CONTAINED IN THE BARGAINING AGREEMENT. Where the collective agreement provided for submission of disputes within two weeks after the receipt of employer's answer to a grievance, and that failure to do so should be deemed an acceptance of the grievance, said provisions are binding upon the parties. *Hall v. Sperry Gyroscope Co.*, 26 Misc.2d 566, 208 N.Y.S. 2d 63 (Sup. Ct. N.Y.).

DEMAND FOR ARBITRATION MUST APPRISE THE RESPONDENT OF THE ISSUES TO BE ARBITRATED. A demand which merely stated there was a "claim, controversy, dispute and disagreement which arises out of the February 25th, 1960 agreement and, therefore, must be settled by an arbitrator," was not definite enough to allow the court to grant an order to compel arbitration. *Wetzler v. Sandowski*, N.Y.L.J., March 7, 1961, p. 16 col. 1 (Livoti, J.).

SEC. 35 OF THE N.Y. LIEN LAW PROVIDES THAT THE FILING OF A NOTICE OF LIEN SHALL NOT BE A WAIVER OF ANY RIGHT TO ARBITRATE. *Mancini v. Stern*, 210 N.Y.S. 2d 329 (Conroy, J.).

A CLAIMANT SEEKING ARBITRATION AGAINST THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION IS REQUIRED TO SUBMIT TO AN ORAL EXAMINATION BEFORE TRIAL and cannot impose the requirement that he be given prior written notice of questions which he will be asked. *Motor Vehicle Accident Indemnification Corp. v. Di Ceglio, Motor Vehicle Accident Indemnification Corp. v. Scott,* 214 N.Y.S. 2d 600 (Gulotta, J.).

PARTICIPATION IN ARBITRATION PROCEEDINGS AMOUNTS TO A WAIVER OF THE RIGHT TO CONTEST THE VALIDITY OF THE ARBITRATION AGREEMENT. However, mere requests by a party for extensions of time were not sufficient participation within the meaning of the Civil Practice Act. "Reasonably read, the various applications . . . were no more than successive requests for time to allow petitioner to decide whether to participate in the selection of arbitrators and in the arbitration proceedings or to begin court proceedings for a stay of arbitration." The Court of Appeals therefore affirmed a decision of the Appellate Division which had affirmed an order denying a stay of arbitration. *De Laurentiis v. Cinematografica de las Americas, S.A.,* 9 N.Y. 2d 503 (Desmond, Ch. J.).

VI. THE AWARD

WHERE THE AGREEMENT TO ARBITRATE PROVIDES FOR A MAJORITY VOTE ON AN AWARD, THE FAILURE OF THE THIRD ARBITRATOR TO BE PRESENT DOES NOT NULLIFY THE AWARD. All the arbitrators participated in the hearing, but within the required period for rendering a decision, one of the arbitrators was travelling abroad and was unable to meet with the other two so as to come to a mutual and definite conclusion on the claims. "Since the agreement to arbitrate provided for a majority vote on an award, the failure of the third arbitrator to be present, did not nullify the award." *Spero v. Cohen,* N.Y.L.J., June 1, 1961, p. 15 col. 8 (Sup. Ct. N.Y.).

OHIO COURT ENFORCES NEW YORK JUDGMENT CONFIRMING ARBITRATION AWARD WHERE OHIO PARTY DID NOT APPEAR IN THE PROCEEDINGS. The plaintiff resorted to arbitration before the General Arbitration Council of the Textile Industry in New York City. Defendant refused to participate or appear at the hearings. The resulting award was in favor of the plaintiff, who thereupon obtained a default judgment in the Supreme Court of New York. Plaintiff then commenced suit on the New York judgment in Ohio and the trial court entered judgment in favor of the plaintiff, together with interest at six percent from the date of the New York judgment, and dismissed the counterclaims of the defendant. On appeal, the Court of Appeals affirmed and said: "[The] defendant is bound by his contract to arbitrate; . . . he is bound by the award of the arbitrators; and . . . he cannot now have his claim relitigated in the courts of Ohio." *Blumenthal Print Works, Inc. v. Johnson,* 173 N.E.2d 698 (Court of Appeals, Mahoning County, Ohio).

DELAY OF THREE MONTHS WITHOUT ADEQUATE EXCUSE PRECLUDES OPENING OF DEFAULT OF PARTY ON A MOTION TO CONFIRM AWARD. "To prevail in a motion to open a default the movant must submit (1) an affidavit of merits, and (2) a reasonable excuse for the default; and he must also apply for such relief within a reasonable time after he has knowledge of the default." *State Laundry Corp. v. Laundry Workers Joint Bd.,* 212 N.Y.S. 2d 630 (Pittoni, J.).

THREE MONTH TIME LIMIT FOR VACATING AN AWARD IS NOT TOLLED WHEN GROUNDS FOR POSSIBLE VACATUR ARE THEREAFTER DISCOVERED. Lack of knowledge of alleged facts which might warrant setting aside an award does not extend the time to seek a vacation of the award. "Indeed lack of knowledge of facts underlying a claim does not toll a statute of limitations . . . unless the statute itself provides that the cause does not accrue until the facts are discovered . . . If absence of knowledge of facts relating to arbitration were to be a basis for tolling the three-month statutory provision, then a means for evading the time limitation for vacating awards would readily be at hand, placing them in constant jeopardy." *Brotherhood of Railway & Steamship Clerks, AFL-CIO v. Pan American World Airways, Inc.,* 211 N.Y.S. 2d 370 (Brenner, J.).

REQUIREMENT THAT AWARD BE RENDERED WITHIN THIRTY DAYS FROM CLOSE OF HEARINGS IS MANDATORY. The parties submitted a dispute to arbitration under the Standard Form of Arbitration Procedure, issued by the American Institute of Architects. These rules provide that "the award shall be made within a period of thirty days from the closing of the proceedings and shall be delivered or mailed simultaneously to each party, and a copy thereof to the Architect." The award was delivered 18 days late; the court held the time limitation was absolute and the award rendered 48 days after the close of hearings was invalid. *Fagnani v. Integrity Finance Corp.,* 167 A.2d 67 (Superior Ct. Delaware, Stiftel, J.).

OMISSION OF AN ACKNOWLEDGMENT MAY BE CURED AFTER THE PUBLICATION AND DELIVERY OF THE AWARD TO THE PARTIES AND EVEN AFTER IT HAS BEEN FILED IN COURT FOR CONFIRMATION. *Librascope Incorporated v. Precision Lodge No.* 1600, *Int'l Association of Machinists, AFL-CIO,* 10 Cal. Rptr. 795 (Dist. Ct. of Appeal, Second Dist., Calif., Vallee, J.).

CALIFORNIA COURTS UPHOLD ARBITRATION AWARD GRANTING REINSTATEMENT TO EMPLOYEES WHO WERE DISCHARGED FOR THE REASON THAT THEY WERE OVER 65 YEARS OF AGE, even though there was no language in the contract specifically dealing with the termination of employment for age reasons. *Broadway-Hale Stores v. Retail Clerks, etc.,* 36 LA 745 (California Supreme Court, Schauer, J.).

PENNSYLVANIA SUPREME COURT REAFFIRMS RULE THAT AN ARBITRATION AWARD WILL NOT BE REVIEWED OR SET ASIDE in absence of a showing that the arbitrators exceeded their authority or imperfectly executed their powers. *Majcher v. Bronder,* 165 A.2d 251 (Sup. Ct. Pa., Duff, J.).

TEXAS COURT ENFORCES ARBITRATION AWARD REDUCED TO JUDGMENT IN NEW YORK WHERE TEXAS PARTY DID NOT PARTICIPATE IN THE PROCEEDINGS. The parties had agreed to arbitration in New York pursuant to AAA Rules. An award rendered against the defaulting party was later amended by the New York Supreme Court and a judgment entered on the award. The defendant had also been notified of the proceeding filed in the New York court for amendment of the award and failed to appear despite the notice which it received. The Federal District Court for the Western District of Texas granted summary judgment against the defendant on a suit to enforce the judgment of the New York court. In affirming the decision of the district court, the U. S. Court of Appeals stated the general principles of law that "in a suit on a judgment of a state court, predicated on proper jurisdiction over the subject matter and person, as was the case here, through the consent thereto of defendant under the full faith and credit clause and the decisions under it, the judgment is not subject to collateral attack." And further, "In a suit on such a judgment, no defense may be set up which goes to the merit of the original controversy . . . The defendant, having voluntarily chosen not to assert any defenses in the New York proceeding, is foreclosed from asserting them now . . . The arbitration agreement was valid under the laws of the State of New York, and the New York judgment must be given full faith and credit." *Midessa Television Co. v. Motion Pictures for Television, Inc.,* No. 18737 (5th Cir., May 17, 1961, Hutcheson, C. J.).

A COURT MAY NOT REVIEW A DECISION OF AN ARBITRATOR UNDER A COLLECTIVE BARGAINING AGREEMENT. Said the Federal District Court, Massachusetts: "In the instant case it is clear that the collective bargaining agreement, which is controlling on the rights of the parties, provided for the determination of all grievances by arbitration and, also, provided that the decision of the arbitrator was to be final. The plaintiff, on his own testimony, assented to submitting his grievance to the impartial umpire. I find and rule that the decision of the umpire is final and binding upon the parties and may not be re-tried by this Court." *Howard v. United States Rubber Co.,* 190 F.Supp. 663 (Caffrey, D. J.).

COURT MODIFIES AWARD TO THE EFFECT THAT THE DISCLOSED PRINCIPAL BE ADDED AS AN ALTERNATIVE PARTY DIRECTED TO PAY THE AMOUNT OF THE AWARD. "The original contract, containing the provision for arbitration of all controversies before the Association of Food Distributors, made between petitioner and the agent, disclosed on its face that the agent was acting for the principal named therein. Petitioner, however, failed to join the principal in the arbitration proceedings. It was not incumbent upon the arbitrators to advise petitioner as to the law in this regard nor could the arbitrators, on their own initiative, render an award against a party who was not notified of or joined in the proceedings. Nevertheless, under the circumstances herein, it is clear that the agent was authorized by and acting in behalf of his disclosed principal and that the principal, and not the agent personally, was a party to the contract and to the arbitration." *Brafman v. Capitol Wholesale Grocery Co.,* N.Y.L.J., March 10, 1961, p. 13 col 1 (Aurelio, J.).

AWARD DISMISSING GRIEVANCE THAT EMPLOYER SPEEDED UP ASSEMBLY LINE IN VIOLATION OF AGREEMENT MAY NOT ORDER PARTIES TO ENTER INTO NEGOTIATIONS FOR ENGINEERING STUDIES TO CORRECT THE GRIEVANCE. To direct the union and the company to enter into negotiations concerning the specified engineering surveys and studies, was determining a matter that was not directly involved in the case, and had not been submitted to arbitration. *Local* 791, *Int'l Union of Electrical, Radio & Machine Workers, AFL-CIO v. Magnavox Co.*, 286 F.2d 465 (6th Cir., McAllister, Ch. J.).

COURT UPHOLDS AWARD GRANTING EMPLOYEES REQUESTED JOB RECLASSIFICATION despite fact that the collective bargaining agreement gave the employee the right to promote, demote and transfer employees, and that the arbitrator did not have power to add to or subtract from or modify any terms of the agreement or to establish any job rate. *American Brake Shoe Co. v. Local No.* 149, *Int'l Union, United Automobile Workers*, 285 F.2d 869 (4th Cir., Paul, D. J.).

CALIFORNIA COURT UPHOLDS ARBITRATION AWARD RENDERED PURSUANT TO UNINSURED MOTORIST ENDORSEMENT DESPITE PRIOR COMMENCEMENT OF LAWSUIT IN ANOTHER JURISDICTION. The petitioner, who defaulted in arbitration, argued that the party seeking arbitration should first have sought to stay the court proceedings commenced in the District of Columbia, pending arbitration pursuant to the California Arbitration Statute. The court denied this plea because both proceedings were not pending in California, so that Sec. 1284 of the California Code of Civil Procedure was not applicable. *Government Employees Insurance Co. v. John R. Brunner*, 191 A.C.A. 327 (Dist. Ct. of Appeal, 2d Dist. 1961).

CALIFORNIA COURT REFUSES TO VACATE AWARD UPHOLDING DISCHARGE OF EMPLOYEES WHERE THE UNION ALLEGED THE PENALTY WAS TOO SEVERE. The arbitrators decided that stealing the company's gasoline was proper cause for discharge and that under the terms of the contract they had no power to mitigate or otherwise modify the discharge penalty imposed by the employer. The union moved to set aside the award and the court refused, saying: "It is settled that an arbitrator's decision concerning the construction of a contract such as this, is final and that the courts do not have power to overrule the arbitrator because it interprets the contract differently." *Oil, Chemical & Atomic Workers Int'l Union, Local* 1-128 *v. Texaco, Inc.*, Superior Court, Los Angeles County, No. SO C 1697, May 29, 1961 (John F. McCarthy, J.).

COURT REFUSES TO OPEN DEFAULT JUDGMENT CONFIRMING ARBITRATION AWARD. "To prevail in a motion to open a default the movant must submit (1) an affidavit of merits, and (2) a reasonable excuse for the default." The assertion that the arbitrator was without authority to pass on the dispute may not be made by one who has participated in the proceedings. *Matter of State Laundry Corp.*, N.Y.L.J., March 16, 1961, p. 16 col. 6 (Pittoni, J.).

COURT CONFIRMS EX PARTE AWARD WHERE ARBITRATORS ACTED ON THE BASIS OF "SUFFICIENT PROOF" FURNISHED BY THE PARTICIPATING PARTY. "There was sufficient proof for the arbitrators to determine the insurance, storage and trucking charges and the proof was not vitiated in the least because the arbitrators ex parte confirmed the amounts. Where evidence is gathered ex parte and is merely confirmatory of earlier testimony upon which the arbitrators were warranted in basing their award, there is no misconduct." *Dessy-Atco, Inc. v. Youngset Fashions, Inc.*, 205 N.Y.S.2d 577 (Sup. Ct. 1960).

AWARD IS AS BINDING AND CONCLUSIVE UNDER THE DOCTRINE OF RES JUDICATA AND ESTOPPEL AS THE JUDGMENT OF A COURT. Where an arbitrator has determined that an actor did not owe any further commissions to his agency under an existing contract, such determination against it on the merits, was collaterally estopped from maintaining an action against the actor, its former employee. *James L. Saphier Agency, Inc. v. Green*, 190 F.Supp. 713 (S.D. N.Y., Ritter, D. J.).

COURT UPHOLDS ARBITRATION AWARDS GRANTING A SUM LESS THAN THE AMOUNT DEMANDED. The respondent opposed confirmation of the award on the theory that the arbitrator exceeded his authority in compromising the dispute by granting a sum less than the amount claimed. The court said: "The fact that the award is less than the amount demanded does not, of itself, establish a compromise." *A. A. Tube Testing Co. v. Ketchell*, N.Y.L.J., May 15, 1961, p. 17 col 5 (Zaleski, J.).